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1287

No. 3663

1288

United States
Circuit Court of Appeals
For the Ninth Circuit.

TISDALE I. VAN ATTA,

Plaintiff in Error,

vs.

THE MONTANA NATIONAL BANK, a Corpora-
tion,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

FILED

APR - 9 1921

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

TISDALE I. VAN ATTA,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. T. F. McCUE, Esq., Great Falls, Montana,
Attorney for Plaintiff and Plaintiff in Error.

Messrs. GRIMSTAD & BROWN, Billings,
Montana,

J. W. SPEER, Esq., Great Falls, Montana,
Attorneys for Defendant and Defendant in
Error. [1*]

In the District Court of the United States in and
for the District of Montana.

No. 816.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

BE IT REMEMBERED, that on June 24, 1920,
the plaintiff filed his amended complaint herein,
in the words and figures following, to wit: [2]

In the United States District Court, District of the
State of Montana, Great Falls Division.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

*Page-number appearing at foot of page of original certified Transcript
of Record.

Amended Complaint.

The plaintiff for a cause of action against the defendant herein, states:

I.

That the plaintiff is a citizen and a resident of the State of Washington, his place of abode and domicile being in the city of Seattle in such state. That the defendant is a banking corporation, organized and existing under the National Banking Act of the United States, with its principal place of business and domicile located in the city of Billings in the State of Montana.

II.

That on the 27th day of July, 1915, the plaintiff and one W. F. Guy were joint owners and holders, each owning one-half of the following described promissory notes, to wit: One dated June 12th, 1914, due December first, 1914, for \$600.00; one other dated June 12th, 1914, due December first, 1914, for \$300.00; one other dated June 12th, 1914, due October first, 1915, for \$2035.00; one other dated June 12th, 1914, due October first, 1914, for \$2000.00; one other dated June 12th, 1914, due October first, 1922. All of said promissory notes were executed [3] and delivered to plaintiff and the said W. F. Guy by Mike Morley and Louise Morley, the same being secured by certain real estate, described as follows: The south-half of the north-east quarter; the north half of the south half and Lots numbered One, Two, Thrèe, Four, Five, Six, Seven, Eight, Nine, Ten, Eleven and Twelve of Sec-

tion numbered Seventeen, and the Northwest quarter of the Northwest quarter and Lots numbered Three, Four and five of Section numbered Twenty, all in Township numbered Six, North of Range numbered Thirty-nine East of the Montana Meridian, situated in Rosebud County, Montana, containing 666.83 acres, as evidenced by a mortgage of the said Morleys of even date with said promissory note, which mortgage was recorded in the office of the County Clerk and Recorder of Rosebud County, Montana, on October 13th, 1914, in book 6 at page 389 thereof. That said promissory notes bore interest at the rate of seven per cent per annum, payable annually.

III.

That on or about the 27th day of July, 1915, the defendant, through its agents and officers, colluded and connived with the said W. F. Guy with the intent and purpose of defrauding the plaintiff out of his right and interest in the notes aforesaid, by which the said W. H. Guy, to secure his individual indebtedness, pledged to defendant said notes, including plaintiff's half thereof. All of which was done without any authority from plaintiff and without his knowledge or consent. That at said time, the defendant, its agents and officers, well knew that plaintiff was the owner of one-half of such notes.

IV.

That at all time mentioned herein, plaintiff was the owner of one-half of such promissory notes and was entitled to the possession thereof; [4] that on the first day of April, 1920, plaintiff demanded

of defendant the possession of one-half of said promissory notes, which demand was refused by defendant and it thereby converted such notes to its own use. That some time prior to such demand defendant, under the aforesaid collusive and pretended agreement with said W. F. Guy, as pledgee, sold such notes and at such pretended sale it bid the same in its own name and claims to own the same, all of which was wrongful and in wanton disregard of plaintiff's rights and without his knowledge.

V.

That at the time of the conversion of said notes by the defendant as aforesaid they were in full force and effect and wholly unpaid. That the value of said notes so converted at the time of such conversion was and is the sum of \$8,150.00, and that plaintiff's interest therein is and was such sum. That by reason of the facts herein alleged the plaintiff has been damaged in the sum of \$8,150, no part of which has been paid.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of \$8,150.00, with interest thereon since the first day of April, 1920, together with his costs and disbursements herein.

T. F. McCUE,

Attorney for Plaintiff.

State of Montana.

Cascade County,—ss.

T. F. McCue, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above-entitled case; that he has prepared the foregoing

complaint and knows the contents thereof, and [5] states upon his best knowledge, information and belief that the allegations and statements are true as set forth therein and that he believes the same to be true; that this verification is made by affiant on behalf of the plaintiff for the reason that plaintiff is not in this state or present in Cascade county, where this verification is made at the time thereof.

T. F. McCUE.

Subscribed and sworn to by the said T. F. McCue before me this 23d day of June, 1920.

[Seal]

GEORGE M. LAIRD,

Notary Public of the State of Montana, Residing at Great Falls.

My commission expires May 15, 1923.

[Endorsed on the back]: No. 816. Title of Court. Title of Cause. Amended Complaint. Filed June 24th, 1920. C. R. Garlow, Clerk. By H. H. Walker, Deputy Clerk. [6]

Thereafter, on September 20, 1920, answer to amended complaint was filed herein, as follows, to wit:

In the United States District Court, District of the State of Montana, Great Falls Division.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Answer to Amended Complaint.

Comes now the above-named defendant and for its answer to the amended complaint on file herein, admits denies and alleges as follows, to wit:

I.

Admits the allegations contained in paragraph I of said amended complaint and denies, generally, each and every allegation in said amended complaint not hereinafter admitted or qualified.

For a further defense, the defendant alleges:

I.

That the plaintiff and one W. F. Guy, mentioned in plaintiff's complaint, in paragraph two thereof, were at all times mentioned in said complaint, and particularly on the 27th day of July, 1915, co-partners, and as such were doing business under the firm name and style of Guy & Van Atta; that the said plaintiff did not at any time own the said notes described in paragraph two of said defendant's answer; that said notes were owned by a co-partnership consisting of W. F. [7] Guy and Tisdale I. Van Atta, the plaintiff herein, and that plaintiff's interest in said notes on the 27th day of July, 1915, and for some time prior thereto, was a partnership interest, and that he had no individual interest in the same; that he and the said W. F. Guy, on the 27th day of July, 1915, and for a period of more than two years prior thereto, held themselves out to the defendant as partners; that the said W. F. Guy is still living, and the defendant therefore alleges the fact to be that the plaintiff is not the real party

in interest and is not entitled to bring the action alleged in said complaint.

For a further defense, defendant alleges:

I.

That at all times hereinafter mentioned the said plaintiff, Tisdale I. Van Atta, and one W. F. Guy were a copartnership and as such were doing business under the firm name and style of Guy & Van Atta; that said partnership became, on or about the first day of December, 1914, and so far as this answering defendant knows, that said partnership is still in existence and that the same has never been dissolved, and that the said W. F. Guy is still living.

II.

That on or about the first day of December, 1914, the said W. F. Guy and the plaintiff herein, as partners, were indebted to the First National Bank, a banking corporation of Forsyth, Montana, in the sum of about Forty-five Hundred Dollars (\$4500.00); that as security for the said sum the said W. F. Guy and the plaintiff herein pledged to said First National Bank of Forsyth, Montana, the notes described in paragraph two of plaintiff's complaint; that said indebtedness due from the said plaintiff and the said W. F. Guy to the First National Bank of Forsyth, Montana, became due on or about March 1, 1915, that the said First National Bank of Forsyth, Montana, at the time said indebtedness [8] became due to said bank, thereupon caused the said notes described in paragraph two of plaintiff's complaint and which were pledged by the plaintiff and one W. F. Guy to the

said First National Bank of Forsyth, Montana, as hereinbefore set forth, to be sold by virtue of its collateral agreement with the said plaintiff and the said plaintiff and the said W. F. Guy, and that on the 27th day of July, 1915, the Bank of Montana, a banking corporation, organized and existing by virtue of the banking laws of the State of Montana, with its principal place of business at Billings, Montana, purchased the notes described in paragraph two of plaintiff's complaint, which were the notes pledged by plaintiff and one W. F. Guy, as hereinbefore set forth, to the said bank at Forsyth, paying for said notes the sum of Four Thousand Five Hundred Thirty-six and 65/100 Dollars (\$4,536.65), and that said First National Bank of Forsyth thereupon delivered to the Bank of Montana a bill of sale, which bill of sale is hereunto annexed, marked Exhibit "A," and made a part hereof; that said sale of said notes to the Bank of Montana by the First National Bank of Forsyth was made by virtue of a collateral pledge agreement given by the said W. F. Guy and the plaintiff herein to the said Bank at Forsyth, which collateral pledge agreement, among other things, provided as follows:

"I, or we, have transferred and delivered to First National Bank of Forsyth, as collateral security for the payment of this and any other liabilities of the undersigned to the said bank, due or to become due, or that may hereafter be contracted, the following property, value of which is \$———viz: and the undersigned here-

by gives the payee and its assigns authority to sell said property, or any part thereof, or any substitutes thereof, and all additions thereto, on the maturity of the above note, or any time thereafter, or before, in the event of the said security depreciating in value, at any public or private sale, without advertising the same, or demanding payment, or giving notice, with the right to said bank and its assigns themselves to be the purchasers, and after deducting all costs and expenses to apply the residue to the payment of any, either, or all liabilities, as aforesaid, as said payee, or its president, cashier, or assigns, may elect, returning the overplus to the undersigned, and in [9] case the proceeds of the sale of said property shall not cover the principal, interest, and expenses, the undersigned engages to pay the deficiency forthwith, after such sale, with legal interest.

Dated June 22, 1914.

GUY & VAN ATTA.

By Dr. GUY.

At the time of said sale, to wit, on the 27th day of July, 1915, the said plaintiff and W. F. Guy were indebted to the First National Bank of Forsyth in the sum of Four Thousand Five Hundred Thirty-six and 65/100 Dollars (\$4,536.65), and that said sum had been past due since about March 1, 1915; that demand for payment had been made, but that the said plaintiff and the said W. F. Guy, or either of them, refused to pay the same, and that the said

Bank at Forsyth thereupon sold said notes to the said Bank of Montana, who thereupon became the owner thereof in its own right; that said sale was made in good faith and in accordance with the terms of said collateral pledge agreement.

III.

That on June 6, 1914, the plaintiff herein made and executed his certain promissory note to the Bank of Montana, a corporation organized and existing under and by virtue of the laws of the State of Montana, which note was in words and figures as follows:

Billings, Montana, June 6, 1914.

No. 1638.

December 1, 1914, after date, for value received we jointly and severally promise to pay to the order of THE BANK OF MONTANA, [10] BILLINGS, MONTANA, One Thousand Dollars (\$1,000.00), at the Bank of Montana, Billings, Montana, with interest at 8 per cent per annum, payable semi-annually until due, and twelve per cent thereafter, and with all costs of collection, including attorney's fees, if not paid at maturity. Each of the makers hereof and the endorsers hereon, waive demand, protest, and notice of nonpayment.

P. O. Address.

T. I. VAN ATTA.

That on June 27, 1914, the said plaintiff herein, acting for and on behalf of the said W. F. Guy and the plaintiff, who were at that time a copartnership, made, executed and delivered to the Bank of Montana a certain promissory note in words and figures as follows, to wit:

Billings, Montana, June 27, 1914.

No. 1699.

30 days after date, for value received, we jointly and severally promise to pay to the order of THE BANK OF MONTANA, BILLINGS, MONTANA, Fifteen Hundred Dollars (\$1500.00), at the Bank of Montana, Billings, Montana, with interest at 8 per cent per annum, payable semi-annually until due and twelve per cent thereafter; and with all costs of collection, including Attorney's fee, if not paid at maturity. Each of the makers hereof and the endorsers hereon, waive demand, protest, and notice of nonpayment.

GUY & VAN ATTA.

T. I. VAN ATTA.

That on September 28, 1914, the plaintiff herein made, executed and delivered his certain promissory note to the Bank of Montana, which note is in words and figures as follows, to wit:

Billings, Mont., Sept. 28, 1914.

No. 2096.

30 days after date, for value received, we jointly and severally promise to pay to the order of THE BANK OF MONTANA, BILLINGS, MONTANA, Six Hundred Fifty Dollars (\$650.00), at the Bank of Montana, Billings, Montana, with interest at 10 per cent, per annum, payable semi-annually [11] until due, and twelve per cent thereafter; and with all costs of collection, including attorney's fees, if not paid at maturity. Each of the makers hereof

and the endorsers hereon waive demand, protest and notice of nonpayment.

P. O. Address.

T. I. VAN ATTA.

that said first note hereinbefore mentioned matured on December 1, 1914, and that the second note hereinbefore mentioned matured on the 27th day of July, 1914, and that the third note just hereinbefore mentioned matured on the 28th day of October, 1914; that the said Bank of Montana, at various times after said notes became due, demanded payment of said notes, but that the plaintiff herein refused to pay the same, and that the said W. F. Guy refused to pay the same.

IV.

On July 27, 1915, the said plaintiff herein was indebted to the Bank of Montana in the sum of Six Hundred Fifty Dollars (\$650.00), represented by the note dated September 28, 1914, hereinbefore mentioned, together with interest on said note from September 28, 1914, and was likewise indebted to the Bank of Montana in the sum of One Thousand Dollars (\$1,000.00), represented by the promissory note hereinbefore mentioned dated June 6, 1914, together with interest on said sum, and that said plaintiff, together with the said W. F. Guy, was likewise indebted to the said Bank of Montana on said date in the sum of Fifteen Hundred Dollars (\$1500.00), together with interest on said sum, which sum was represented by the promissory note hereinbefore mentioned dated June 27, 1914; that the said Bank had made frequent demands for the payment of all of said indebtedness. [12]

V.

That at that time and for some considerable time before that the said W. F. Guy was interested in the said notes described in paragraph two of plaintiff's complaint; that he was informed that his interest in said notes had been sold under the collateral pledge agreement hereinbefore mentioned; that the plaintiff Tisdale I. Van Atta was likewise informed that his interest in said notes had been sold by the said bank at Forsyth, under the collateral pledge agreement hereinbefore mentioned; that the said W. F. Guy was at that time, and for some considerable time prior thereto, making every effort to obtain a settlement with the said plaintiff in reference to their partnership, and particularly the partnership transaction involving said notes mentioned in paragraph two of plaintiff's complaint, and also a certain contract for deed involving certain city property located in the city of Great Falls, Montana.

VI.

That the Bank of Montana, on or about the 5th day of January, 1915, brought an action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against William F. Guy and T. I. Van Atta, who is the plaintiff mentioned in this complaint, which action was for the purpose of enforcing the collection of the said promissory note hereinbefore mentioned, which note was for the sum of Fifteen Hundred Dollars (\$1500.00) and was dated June 27, 1914; that said Bank of Montana, on or about the 5th day of January, 1915, brought an action in the Eighth Judicial

District of the State of Montana, in and for the County of Cascade, against T. I. Van Atta, which action was for the purpose of enforcing the payment of the two promissory notes hereinbefore mentioned, one in the sum of Six Hundred Fifty Dollars (\$650.00) and the other in the sum of One Thousand Dollars (\$1,000.00); that the said defendant in said action, or either of them, did not pay [13] the same and refused at all times to pay the same, and that finally, on or about July 27, 1915, the said W. F. Guy gave his certain promissory note to the said Bank of Montana, which note is in words and figures as follows, to wit:

Billings, Montana, July 27, 1915.

No. 3741.

June 1, 1916, after date, for value received, we jointly and severally promise to pay to the order of THE BANK OF MONTANA, BILLINGS, MONTANA, Eighty-two Hundred Twenty-one and 36/100 (\$8,221.36), at the Bank of Montana, Billings, Montana, with interest at 8 per cent per annum, payable semi-annually until due and twelve per cent thereafter; and with all costs of collection, including attorney's fees, if not paid at maturity. Each of the makers hereof and the endorsers hereon, waive demand, protest, and notice of nonpayment.

W. F. GUY.

P. O. Address:

Great Falls, Mont.

1st Nat. Bk. Bldg.

Secured by collateral.

—that said note was given for the purpose of pay-

ing to the said Bank of Montana the money it had paid to the First National Bank of Forsyth, on the sale of the said notes hereinbefore mentioned, and was likewise given for the purpose of paying to the said Bank of Montana the three notes hereinbefore mentioned, made, executed and delivered to the said Bank of Montana, one in the sum of One Thousand Dollars (\$1,000.00), and one in the sum of Six Hundred Fifty Dollars (\$650.00), and one in the sum of Fifteen Hundred Dollars (\$1500.00), together with interest on said notes, together with the costs incurred by the said Bank of Montana in bringing the action to enforce payment of said notes, as hereinbefore set forth; that all of said sums, together with interest and costs, etc., amounted to the sum of Eighty-two Hundred Twenty-one and 61/100 Dollars (\$8,221.61), set forth in the said note signed by W. F. Guy. [14]

VI.

That at the same time, to wit, on the said 27th day of July, 1915, the said Bank of Montana, in consideration for the signing, execution and delivery of said note, the said W. F. Guy became the owner of said notes described in paragraph two of plaintiff's amended complaint, subject, nevertheless, to the right of the said Bank of Montana to hold said notes until the said W. F. Guy satisfied in full the note signed by him on said date, and that said W. F. Guy thereupon gave to the said Bank of Montana a certain collateral pledge agreement, which collateral pledge agreement is hereby annexed, marked Exhibit "B," and made a part hereof.

VIII.

That said W. F. Guy did not, at the maturity of said note, pay the same to the Bank of Montana, although demand for payment of same was frequently made, and that thereupon the said Bank of Montana, on or about the 23d day of January, 1917, sold said notes so pledged to it by the said W. F. Guy under the collateral pledge agreement hereunto annexed and marked Exhibit "B," and that at said sale the said Bank of Montana became the purchaser, and that the same was in all respects fair and legal and was made in accordance with the terms of said agreement; that notice of said sale was given to the said W. F. Guy by the said bank, and that thereupon the said Bank of Montana became the owner of said notes described in paragraph two of said plaintiff's amended complaint.

IX.

That said notes described in paragraph two of said plaintiff's amended complaint were secured by a mortgage on certain real estate located in the county of Rosebud, State of Montana, and that a copy of said mortgage is hereto annexed and made a part of this answer and marked Exhibit "C"; that said mortgage was a second mortgage, there being a first mortgage on said premises given by Tisdale [15] I. Van Atta, the plaintiff herein, and his wife, and W. F. Guy and his wife to one Abolone Larson, which mortgage was in the sum of Ten Thousand Dollars (\$10,000.00); that at the time said notes so described in paragraph two of plaintiff's amended complaint were delivered to

the said Bank of Montana by the said First National Bank of Forsyth, the said interest on the said first mortgage hereinbefore described had not been paid by the said Mike Morley or Louise Morley, or either of them, and that the taxes on said premises described in said mortgage had not been paid; that said property at that time was not worth more than Fifteen Thousand Dollars (\$15,000.00.).

X.

That at a later date the said Mike Morley and Louise Morley defaulted in the payment of the interest on said first mortgage hereinbefore mentioned, and that the holder of the said mortgage, Abolone Larson thereupon commenced an action in the District Court in and for the county of Rosebud, State of Montana, foreclosing said mortgage, and that the said Mike Morley and Louise Morley and the said plaintiff herein, together with his wife, and the said W. F. Guy, together with his wife, were made party defendants in said action; that said mortgage was foreclosed in the regular way, according to the laws of the State of Montana, and that the property was bid in by the Montana National Bank, a banking corporation, the defendant herein, and that the said defendant thereupon became the owner of said premises subject to the right of redemption on the part of the parties entitled to redeem from said sale; that said sale was made to the defendant herein on the 29th day of September, 1917, and was in all respects fair and legal; that the plaintiff made no effort whatever to redeem from said sale and at the end of the time for

the right of redemption the said plaintiff lost his [16] right in said property, if he had any; that at said sale the defendant herein paid the sum of Twelve Thousand Fourteen and 03/100 Dollars (\$12,014.03), and also paid about the sum of Four Thousand Dollars (\$4,000.00), the same being for delinquent taxes and water assessments on said property described in said mortgage; that on the foreclosure of said property, and after the period of redemption had expired, the second mortgage securing the said notes described in paragraph two of plaintiff's amended complaint became of no value.

XI.

That the plaintiff herein has had ample opportunity since the 27th day of July, 1915, to pay to the said Bank of Montana what he owed the bank and receive from the bank the said notes which the said plaintiff claims to have had an interest in, but that the said plaintiff sat by and refused to do anything towards protecting his interest, if he had any, and that because of his laches he should now be estopped from asserting any claim in and to said notes by reason of any title he may have had in them before the 27th day of July, 1915.

For a further defense and by way of new matter, defendant alleges:

I.

That the plaintiff herein is and was indebted to the defendant herein, at all times hereinafter mentioned, in the sum of Three Thousand One Hundred Fifty Dollars (\$3,150.00), together with ac-

crued interest and costs represented by three certain promissory notes made, executed and delivered by the plaintiff in June and September, 1914; that said notes have not been paid by the plaintiff herein and that he still owes them, and that demand for the payment of same has been made at various times; that plaintiff herein has not paid to this defendant the said sum of Four Thousand Five Hundred Thirty-six and 65/100 Dollars (\$4,536.65), paid by the Bank of Montana to the First National Bank of Forsyth, Montana, on the 27th day of [17] July, 1915, said sum being paid to said bank for the notes described in paragraph two of plaintiff's amended complaint; that the plaintiff herein did not, before the commencement of this action, tender to the defendant herein the amount due and owing defendant from plaintiff.

For a further defense and by way of new matter, defendant alleges:

I.

That the said Mike Morley and Louise Morley, the makers of the notes described in paragraph two of plaintiff's amended complaint, were on July 25, 1915, and for some time prior thereto, and all the time subsequent thereto, absolutely insolvent and unable to pay any of their debts, and that by reason thereof the said notes described in plaintiff's amended complaint are and were absolutely worthless and of no value whatsoever; that the said Louise Morley had no property, and that the said Mike Morley, at the time of his death, on or about March 1, 1920, had no property of any kind whatsoever,

and that the said Louise Morley was unable to pay his funeral expenses, and that she was obliged to rely on her friends and relatives to pay the same.

For a further defense and by way of new matter, defendant alleges:

I.

That the cause of action in the complaint of plaintiff herein is barred by the provisions of the third subdivision of Section 6447 of the Revised Codes of the State of Montana, 1907, for the reason that the said cause of action stated in the complaint has not commenced within three years after the same accrued, if plaintiff had any action. [18]

Further answering, defendant denies that the plaintiff at the time of the alleged conversion set forth in the amended complaint, or at any other time, was the owner of the promissory notes, or any of them, mentioned in paragraph two of said amended complaint, and denies that the plaintiff is entitled to the possession of said notes, or either of them, and denies that the defendant, at or about the time alleged in the complaint, or at any other time, converted said notes, or any of them, to its own use or benefit, and denies that it has since continued to convert said notes to its own use and benefit, and denies that plaintiff has been damaged in the sum of Eight Thousand One Hundred Fifty Dollars (\$8,150.00), or in any sum whatsoever, and denies that said notes at the time of said alleged conversion were worth the sum of Eight Thousand One Hundred Fifty Dollars (\$8,150.00), and in this

behalf alleges that the said notes were absolutely worthless.

Denies that on July 27, 1915, or at any other time, that this *this* defendant, through its agents and officers, colluded and connived, or in any other manner negotiated with one W. F. Guy with the intent or purpose of defrauding the said plaintiff out of any right or interest he may have had at that time in said notes mentioned in paragraph two of plaintiff's amended complaint, and denies that defendant at any time negotiated with the said W. F. Guy except as hereinbefore set forth.

WHEREFORE, defendant prays judgment, that plaintiff take nothing, and that defendant do have and recover its costs in this action herein expended.

[Seal]

GRIMSTAD & BROWN,

By O. KING GRIMSTAD. [19]

State of Montana,

County of Yellowstone,—ss.

N. A. Telyea, being first duly sworn, deposes and says:

That he is one of the officers of the above-named defendant, the Montana National Bank, a corporation, to wit, cashier, and as such makes this affidavit of verification; that he has read the foregoing answer, knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

N. A. TELYEA.

Subscribed and sworn to before me this 18th day of September, 1920.

[Seal]

O. KING GRIMSTAD,

Notary Public for the State of Montana, Residing at Billings, Montana.

My commission expires Jan. 12, 1923. [20]

Exhibit "A."

BILL OF SALE.

KNOW ALL MEN BY THESE PRESENTS:

That the First National Bank of Forsyth, the party of the first part, for and in consideration of the sum of Forty-five Hundred Thirty-six and 65/100 Dollars, lawful money of the United States of America to them in hand paid by Bank of Montana of Billings, Montana, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the party of the second part, their agent executors, administrators, and assigns,

Five notes dated June 12th, 1914, in favor of Guy and Van Atta and signed by Mike Morley and Louise Morley amounting to \$11,535.00 with interest applied on one note amounting to \$642.50, said notes being sold to the party of the second part by virtue of collateral note against Guy and Van Atta held by said parties of the first part.

TO HAVE AND TO HOLD the same, to the said party of the second part, their executors, administrators and assigns, FOREVER; and do, for their heirs, executors and administrators, covenant and agree to and with the said party of the second part,

their executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made, unto the said party of the second part, their executors, administrators and assigns, against all and every person and persons whomsoever, lawfully claiming or to claim the same.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the 27th day of July, in the year of our Lord one thousand nine [21] hundred fifteen.

[Seal]

FIRST NATIONAL BANK OF FORSYTH.

(Seal)

E. F. MEYERHOFF, Cashier. (Seal) [22]

Signed, sealed and delivered in the presence of
ROCKWOOD BROWN.

Exhibit "B."

I have transferred and delivered to THE BANK OF MONTANA, Billings, Montana, as collateral security for the payment of any and all liabilities of the undersigned to said Bank, due or to become due, or that may hereafter be contracted, the following property, in my right and title, value of which is Eleven Thousand Five Hundred Thirty-five & no/100 Dollars, viz.:

Makers.	Date.	Due.	Amount.
Note of Mike Morley and Louise Morley	June 12, 1914,	December 1, 1914	\$600.00
" " Mike Morley and Louise Morley	June 12, 1914,	December 1, 1914	\$300.00
" " Mike Morley and Louise Morley	June 12, 1914,	October 1, 1915	2035.00
" " Mike Morley and Louise Morley	June 12, 1914,	October 1, 1914	2000.00
Cr. Account pipe for Syphon	12/16/14	\$642.50 applied on	interest
" " Mike Morley and Louise Morley	June 12, 1914,	October 1, 1912	6600.00

And the undersigned hereby gives the said payee and its assigns authority to sell the said property, or any part thereof, or any substitutes, and all additions thereto, on the maturity of any or all my liabilities, or at any time thereafter, or before, in the event of the said securities depreciating in value, at any public or private sale, without advertising the same or demanding payment, or giving notice, with the right to said Bank and its assigns to be the purchasers; and after deducting all costs and expenses, to apply the residue to the payment of any, either or all liabilities as aforesaid, as said payee, or its President, Cashier, or assigns shall elect, returning the overplus to the undersigned; and in case of the sale of said property shall not cover the principal, interest, and expenses, the undersigned engages to pay the said deficiency forthwith after such sale, with legal interest.

Billings, Montana, July 27, 1915.

W. F. GUY. [23]

Exhibit "C."

MORTGAGE.

THIS MORTGAGE, made and entered into this 12th day of June, A. D. 1914, by and between Louise Morley and Mike Morley her husband of Howard, Montana, MORTGAGORS and W. F. Guy and Tisdale I. Van Atta, co-partners under the firm name of Guy and Van Atta, MORTGAGEES,

WITNESSETH: That the said Mortgagors, for and in consideration of the sum of Eleven Thousand Five Hundred Thirty-five and no/100 Dollars (\$11,535.00) in hand paid by said Mortgagees, the receipt

of which is hereby acknowledged, do hereby mortgage and confirm unto said Mortgagees and successors and assigns, forever, the hereinafter described Real Estate, situate, lying and being in ——— County of Rosebud, and State of Montana.

Northwest Quarter of the Northwest Quarter and Lots numbered Three (3), Four (4), and Five (5), of Section Twenty (20), containing 143.09 acres; also Lot numbered Eight (8) of Section Seventeen (17), containing 6.33 acres; also Lots numbered One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Nine (9), Ten (10), Eleven (11) and Twelve (12) and the South Half of the Northeast Quarter and the North Half of the South Half of Section Seventeen (17) containing 515.40 acres. All lying and being in Township Six (6) North of Range Thirty-nine (39) East of Montana Meridian in Montana, together with all rights to the use of water for irrigating said premises and for domestic use thereon, to which the said mortgages or the said premises hereby conveyed are now or may hereafter become entitled, together with all shares of stocks or shares of water in any ditch or irrigation company, which in any manner entitled said mortgagors to water for irrigating or domestic purposes upon said land. Together with all and singular tenements and hereditaments and appurtenances thereunto belonging or appertaining.

Together with all and singular the tenements, hereditaments, appurtenances, easements, water and all other rights belonging or in [24] anywise apper-

taining thereto, unto the said Mortgagees, and successors and assigns.

The said Mortgagors represent to and covenant with the said Mortgagees and successors and assigns that they will WARRANT and defend said premises against the lawful claims of all persons whomsoever and the said Mortgagor each hereby relinquish all right of dower and all right of Homestead, accruing or to accrue, in and to all of said premises; and the said Mortgagor hereby covenant with the said Mortgagees that they are lawfully "seized" and in possession of said premises and the same is free from all encumbrance excepting a mortgage heretofore given by the mortgagees to John Larsen in the sum of Ten Thousand and no/100 Dollars.

PROVIDED ALWAYS. That these presents are upon the express condition that if said mortgagors their heirs, executors or administrators, shall pay or cause to be paid to the said mortgagees and successors and assigns, the full sum of Eleven Thousand Five Hundred Thirty-five and no/100 Dollars, according to the tenor and effect of five certain promissory note or obligation secured hereby, as follows:

One note for \$2,000.00 dated June 12, 1914, due October 1, 1914;

One note for \$600.00 dated June 12, 1914, due December 1, 1914;

One note for \$300.00 dated June 12, 1914, due December 1, 1914;

One note for \$2,035.00 dated June 12, 1914, due October 1, 1915;

One note for \$6,600.00 dated June 12, 1914, due October 1, 1922, each bearing interest at the rate of 7% per annum from date, interest payable annually at First National Bank at Forsyth, Montana.

Then these presents to be VOID, otherwise to be and remain in full force and effect.

It is agreed that if the Mortgagors or maker or makers of the obligation [25] secured by this indenture shall fail to pay the principal or any interest as the same become due, or any taxes, assessments or insurance as required, or otherwise fail to comply with any one or all of the conditions of this mortgage, then all of said debt secured hereby shall become due and collectible, and all rents and profits of said property shall then immediately accrue to the benefit of said Mortgagees; and this mortgage may be foreclosed for the full amount, together with cost, taxes, insurance, cost of abstract of title, attorney's fees, and any and all other sums advanced or expenses incurred on account of said Mortgagors, for whatsoever purposes, and any and all advances shall draw interest at the rate of ten per cent per annum; and be liens under this indenture.

A release of this mortgage is to be made at the expense of the Mortgagors on full payment of the indebtedness secured hereby.

IN WITNESS WHEREOF, the said Mortgagors have hereunto set their hands and seal the day and year first above written.

LOUISE MORLEY. (Seal)

MIKE MORLEY. (Seal)

Signed sealed and delivered in the presence of

[26]

State of Montana,
County of Rosebud,—ss.

On this 12th day of October, in the year A. D. one thousand nine hundred and fourteen, before me, E. F. Meyerhoof, a notary public in and for the county and state aforesaid, personally appeared Louise Morley and Mike Morley known to me (or proven to me on the oath of ——) to be the persons whose names subscribed to the within instrument, and acknowledged to me that they each of them respectively, executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal, the day and year first above written.

[Seal]

E. F. MEYERHOFF,

Notary Public for the State of Montana, Residing at
Forsyth.

My commission expires August 14th, 1917.

(Endorsed on back:)

No. 13985.

MORTGAGE.

Louise Morley and Mike Morley
to

Guy and Van Atta.

Dated June 12th, 1914.

State of Montana,
County of Rosebud,—ss.

Filed for record the 13 day of Oct., A. D. 1914, at

9 o'clock A. M., and recorded, in Book 6 of Mortgages, Page 389 of the Records of Rosebud County, State of Montana.

R. J. COLE,

Recorder of Deeds.

By J. L. Crawford,

Deputy.

Fees \$1.50.

Return to 1st Natl.

c/o 1st Natl.

[Endorsed on the back]: No. 816. Title of Court and Title of Cause. Answer to Amended Complaint. Filed this 20th day of Sept. 1920. C. R. Garlow, Clerk. [27]

Thereafter, on Sept. 20, 1920, reply to answer was duly filed herein, as follows, to wit:

In the United States District Court, District of the State of Montana, Great Falls Division.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Reply to Answer.

The plaintiff for his reply to the answer of the defendant herein alleges:

I.

The plaintiff denies each and every allegation, matter and thing in the defendant's first defense, except that W. F. Guy is living, which fact is admitted.

II.

Replying to paragraph II of said answer, the plaintiff denies each and every allegation, matter and thing set forth in said paragraph except that at or about the time alleged that the plaintiff and said W. F. Guy were indebted to the First National Bank of Forsyth, in about the sum set forth in said paragraph. The plaintiff especially denies that said First National Bank of Forsyth sold said collateral under said collateral agreement, and alleges the fact to be: That defendant's predecessor merely took a transfer of the notes and indebtedness referred to and stepped in the shoes of said First National Bank of Forsyth.

Further replying to said paragraph II plaintiff alleges that the defendant and its predecessor have waived the right to plead the allegations set forth in said paragraph upon the ground and for the reason that they have waived such right by at all times recognizing that the collateral referred to in such paragraph was held by it as pledge, and [28] not as an owner under a sale by the First National Bank of Forsyth under its collateral agreement; that on account of dealing with said pledged notes for a long period prior to the 27th day of July, 1915, treating the same as the property of this plaintiff, it is now *a stop* from claiming that at said time it was owner of such pledged notes.

III.

Replying to paragraph III of said answer the plaintiffs admit the execution and delivery of the three (3) notes described therein, but allege the fact

to be that the defendant has no interest in said promissory notes nor did it have any interest at the time of the commencement of this action; that on the contrary on or about the 27th day of July, 1915, the defendant assigned and transferred all of said notes to one W. F. Guy, who has been the owner and holder thereof ever since said date.

IV.

Replying to paragraph IV plaintiffs deny each and every allegation, matter and thing therein contained.

V.

Replying to said paragraph V of said answer, the defendant denies each and every allegation, matter and thing therein set forth, but admits that the said W. F. Guy was the owner of one-half interest in the notes referred to.

VI.

Replying to paragraph VI of said answer plaintiff admits that some sort of an action was brought in the District Court of the 8th Judicial District as set forth in said paragraph IV, but alleges the fact to be: That the same was not brought in good faith; that it was a suit instituted by the plaintiff to assist the said W. F. Guy to deprive plaintiff of his right and interest in and to said property, and it was a part of the scheme and fraud alleged and set forth in plaintiff's [29] complaint by which the defendant attempted to assist the said W. F. Guy and this defendant in defrauding the plaintiff out of his interest in and to the notes described in the plaintiff's complaint. Plaintiff admits the execution and delivery of the note described in said paragraph by the said W. F.

Guy, but alleges the fact to be: That this plaintiff has no interest of any nature or kind therein. The plaintiff denies each and every other allegation set forth in said paragraph except that which is hereinbefore admitted.

VII.

Replying to paragraph VII of said complaint the plaintiff denies each and every allegation, matter and thing herein set forth.

VIII.

Replying to paragraph VIII of said answer plaintiff has no knowledge or information of the facts set forth therein upon which to form a belief, and upon information and belief he denies each and every allegation, matter and thing set forth in said paragraph.

IX.

Replying to paragraph IX of said answer plaintiff admits that the notes described in the complaint and referred to in said paragraph of such answer were secured by a mortgage as alleged. Plaintiff especially denies each and every other allegation set forth in said paragraph and alleges the fact to be: That said land securing said notes was at all times mentioned herein of the reasonable market value of Fifty Thousand (\$50,000.00) Dollars.

X.

Replying to paragraph X of said answer the plaintiff alleges that he has neither knowledge nor information sufficient to form a belief, and upon [30] information and belief the plaintiff denies each and every allegation and thing set forth in said paragraph and says that whatever proceedings were had

were done without any knowledge or actual notice to this plaintiff.

Replying to paragraph 1 of the new matter pleaded in said answer, plaintiff denies each and every allegation, matter and thing therein contained, and alleges the fact to be; That at the time of the commencement of this action the plaintiff was not indebted to the defendant in any sum whatever.

Further replying, the plaintiff denies each and every allegation, matter and thing set out in the entire answer of the defendant herein, except that which has hereinbefore been expressly admitted.

WHEREFORE, the plaintiff prays judgment in accordance with the relief demanded in this complaint.

T. F. McCUE,
Attorney for Plaintiff.

State of Montana,
County of Cascade,—ss.

T. F. McCue, being duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled action; that he has prepared the above and foregoing reply and knows the contents thereof; that affiant has personal knowledge of the matters and things set forth in such reply and that the allegations and statements therein contained are true of his own knowledge, except those allegations stated upon information and belief, and as to such allegations—affiant believes the same to be true.

T. F. McCUE.

Subscribed and sworn to before me by the said
T. F. McCue this 20th day of September, A. D. 1920.

[Seal]

W. A. STEPHENSON,

Notary Public for the State of Montana, Residing at
Great Falls.

My commission expires July 25, 1922.

Filed Sept. 20, 1920. C. R. Garlow, Clerk. [31]

Thereafter, on December 22, 1920, upon the trial of
said cause, a directed verdict for defendant was en-
tered herein, the record of trial and verdict being as
follows, to wit: [32]

In the District Court of the United States for the
District of Montana.

No. 816.

T. I. VAN ATTA,

Plaintiff,

vs.

MONTANA NATIONAL BANK,

Defendant.

Verdict and Record of Trial.

This cause came on regularly for trial this day,
T. F. McCue, Esq., appearing for plaintiff, and O. K.
Grimstad, Esq., appearing for defendant. There-
upon on motion of counsel, the name of J. W. Speer,
Esq., was ordered entered as additional counsel for
defendant. Thereupon Court ordered that the mo-
tion for judgment on the pleadings, heard and sub-

mitted on yesterday, be and is denied, to which ruling of the Court the defendant then and there excepted and exception noted. Thereupon the following were duly impaneled, accepted and sworn as a jury to try the cause, viz. P: W. Bradford, M. M. Connor, H. E. Smith John Moriarity, J. Van Teylingen, Bernard Joyce, M. McAndrews, C. A. Oleson, John D. Ross, J. Ira Jones, H. R. Stevens, W. P. Elwell. Thereupon T. I. Van Atta was called and sworn as a witness for plaintiff, whereupon defendant objected to the introduction of any evidence at this time upon the ground the complaint does not state a cause of action, which objection was overruled and exception of defendant noted. Thereupon the said T. I. Van Atta testified as a witness for the plaintiff and W. F. Guy was sworn and examined as a witness [33] for plaintiff. Thereupon plaintiff asked leave to amend the complaint by interlineation, to which the defendant then and there objected, and after due consideration the Court ordered that the amendment be allowed and that said amendment be prepared in writing and filed in due course. Thereupon plaintiff rested, with the privilege of calling another witness who was not present this day because of the change in the date of trial. Thereupon defendant moved the Court to direct a verdict herein in favor of the defendant and against the plaintiff upon the ground the complaint does not state facts sufficient to constitute a cause of action and for lack of proof, which motion was argued and submitted. Thereupon, after due consideration Court ordered that defendant's said motion be granted and that a verdict in favor of the

defendant and against the plaintiff be and hereby is entered by the clerk, to which ruling of the Court the plaintiff then and there excepted and exception noted. Thereupon on motion of counsel for the plaintiff, the said plaintiff was granted thirty days for a bill of exceptions herein.

Entered in open court this 22d day of December, A. D. 1920.

C. R. GARLOW,
Clerk. [34]

Thereafter, on December 29, 1920, Judgment was duly entered herein, in the words and figures following, to wit: [35]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 816.

T. I. VAN ATTA,

Plaintiff,

vs.

MONTANA NATIONAL BANK,

Defendant.

Judgment.

This action came on regularly for trial on the 22d day of December, 1920, the said parties appearing by their attorneys. A jury of twelve persons was regularly impanelled and sworn to try the said action.

Witnesses on the part of plaintiff were sworn and examined and after plaintiff had introduced all his

evidence and had rested his case, counsel for defendant moved the Court to direct the jury to return a verdict in favor of defendant, which motion was by the Court granted and thereupon the clerk of said Court was instructed by said Court to enter a verdict for the defendant, which the said clerk did thereupon do.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by this action and that defendant have and recover of and from plaintiff his costs and disbursements incurred in this action, amounting to the sum of \$237.09.

Judgment rendered and entered this 29th day of December, A. D. 1920.

[Seal]

C. R. GARLOW,

Clerk of the United States District Court. [36]

Thereafter, on Jan. 14, 1921, petition for new trial was filed herein, in the words and figures following, to wit:

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Petition for New Trial.

Now comes the plaintiff in the above-entitled case, through his attorney, T. F. McCue, and petitions this Honorable Court to set aside the judgment rendered in this case and grant a new trial herein.

That this petition is based upon the bill of exceptions settled and allowed herein, also upon the assignment of error filed herewith. Said petition is also further based upon the pleadings and files in this case, all of which is respectfully submitted.

Dated this 12th day of January, A. D. 1921.

T. F. McCUE,
Attorney for Plaintiff,
Great Falls, Montana.

State of Montana,
County of Cascade,—ss.

T. F. McCue, being duly sworn, deposes and says: That he is attorney for the plaintiff in the above-entitled action; that he has prepared the foregoing petition for a new trial and knows the contents thereof; that the contents thereof are true. This verification is made on behalf of plaintiff and made by affiant for the reason that the plaintiff is not present in Cascade County, where this verification is made, at the time of the making thereof. [37]

Dated this 12th day of January, A. D. 1921.

T. F. McCUE.

Subscribed and sworn to by the said T. F. McCue on this 12th day of January, A. D. 1921.

[Seal] W. A. STEPHENSON,
Notary Public for the State of Montana Residing at
Great Falls.

My commission expires July 25, 1922.

Service of the foregoing petition for new trial is hereby admitted and copy of the same received this 13th day of January, 1921.

GRIMSTAD & BROWN and
J. W. SPEER,

Attorneys for Defendant.

[Indorsed on the back]: No. 816. Title of Court.
Title of Cause. Petition for New Trial. Filed Jan.
14, 1921. C. R. Garlow, Clerk. [38]

Thereafter, on Feb. 17, 1921, decision of Court denying new trial was filed herein, as follows, to wit:

United States District Court, Montana.

VAN ATTA

vs.

MONTANA NAT. BANK.

Decision Denying Motion for New Trial.

The motion of plaintiff for a new trial is denied.

It is useless to again point out the law in reference to the facts of the case. There seems nothing to the latter as here presented, save an obsession on the part of plaintiff that by some strategical twist or quirk in the law he can gain possession of former partnership property without payment of partnership and his personal debts for which the property was pledged.

BOURQUIN,

J.

Feb. 17, 1921.

[Indorsed on the back]: No. 816. Title of Court. Title of Cause. Decision—Motion New Trial Denied. Filed Feb. 17, 1921. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [39]

On January 22, 1921, plaintiff's bill of exceptions was duly settled and allowed, and filed herein, being in the words and figures following, to wit: [40]

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, That the above-entitled case came on for trial in the above-named court at the regular term thereof upon the 22d day of December, 1920, before the Hon. GEO. M. BOURQUIN, District Judge, and a jury duly impaneled to try the case. T. F. McCue appeared as counsel for the plaintiff, and Grimstad and Brown and J. W. Speer appeared as counsel for the defendant. Whereupon the following testimony was introduced and proceedings had as follows:

Testimony of Tisdale I. Van Atta, in His Own Behalf.

TISDALE I. VAN ATTA, called and sworn as a witness in his own behalf.

Direct Examination by Mr. McCUE.

I reside in Seattle, Washington, having lived there about two and a half years, and I now reside in Seattle, and I am a citizen and a resident of the State of Washington; have been such for the last couple of years. I am the plaintiff in this action. In 1914 I was a joint owner with Dr. Guy of certain lands in Rosebud County, and was acquainted with this land. Afterwards we sold it to Mike Morley and took a mortgage from Mr. Morley and his wife. The mortgage secured certain notes which notes were executed by Mike Morley and his wife. I don't think I could give you the exact dates of the notes; think it was June, 1914. The notes were dated June 12, 1914; one was for \$600.00, another for \$300.00, another for \$2,036.00; another for \$2,000.00; and another for \$6,600.00. They are the notes I refer to. I left Montana in July, 1914, which was shortly [41] after the sale of this ranch. I am part owner of these notes. I own an undivided half interest in them.

MR. GRIMSTAD.—We can't find the notice of the demand. We will admit the service of the notice on the Montana National Bank alleged here by the plaintiff.

Exhibit 2 was offered and admitted in evidence, read to the jury, and is as follows:

Plaintiff's Exhibit No. 2.

March 29, 1920.

To the Montana National Bank, Billings, Montana.

Please take notice that Tisdale I. Van Atta is the owner of an undivided one half interest in and to the following described notes, to wit:

One note for \$600.00 due December 1, 1914; another note for \$300.00 due December 1, 1914; another note for \$2035.00 due October 1, 1915; another note for the sum of \$2000.00 due June 12, 1914; another note for the sum of \$6600.00 due October 1, 1922.

All of said promissory notes being dated on the 12th day of June, 1914, executed and delivered by Mike Morley and Louisa Morley, his wife, to Guy and Van Atta (W. F. Guy and Tisdale I. Van Atta).

On behalf of Mr. Tisdale I. Van Atta and as his attorney, I demand of you that you deliver to me for him, an undivided one half of the above described promissory notes.

Dated this 27th day of March, 1920.

T. F. McCUE.

Original registered and served by mail March 29, 1920.

Exhibit 3 was offered and admitted in evidence, read to the jury and is as follows:

Plaintiff's Exhibit No. 3.

POST OFFICE DEPARTMENT.
Official Business.

Penalty for Private use to avoid
payment of postage, \$300.00.

REGISTERED ARTICLE:

No. 20290.

INSURED PARCEL:

No.

Postmark of delivering office:

BILLINGS

Mar. 31

9 P. M.

1920

Mont.

and date of delivery. [42]

Return to—T. F. McCue.

(Name of Sender)

Street and Number,

or Post Office Box,

Post Office at.....Great Falls

State.....Montana

(Reverse Side:)

RETURN RECEIPT.

Received from the Postmaster the Registered or
Insured Article, the original number of which ap-
pears on the face of this card.

THE MONTANA NATIONAL BANK.

(Signature of name of addressee.)

CLYDE CLARK.

(Signature of addressee's agent.)

Date of delivery 191—.

(Stamped)

BILLINGS, MONT.

March 31,

1920

REG. DIV.

Exhibit 1 was offered in evidence, admitted and read to the jury and was as follows:

Plaintiff's Exhibit No. 1.

GRIMSTAD & BROWN,

Lawyers.

Billings, Montana.

O. KING GRIMSTAD.

ROCKWOOD BROWN.

WILLIAM GALLAGHER.

April

First

Mineteen Twenty.

T. F. McCue,

First National Bank Bldg.,

Great Falls, Mont.

Dear Sir:

Your notice to the Montana National Bank of this city in reference to the Van Atta matter has been handed to us for attention, and in reply permit us to state that Mr. Van Atta may have had some interest in these notes at one time but if he did, his interest therein was foreclosed, as the property was sold under a collateral agreement. We might state, however, that if Mr. Van Atta is still interested in this transaction sufficiently to take care of the loss sustained by the bank that we might still do business with him.

Yours very truly,

GRIMSTAD & BROWN.

By O. KING GRIMSTAD.

OKG:MEF. [43]

(Testimony of Tisdale I. Van Atta.)

Q. Mr. Van Atta, this partnership, or whatever it was that existed prior to the sale of the ranch, you may state whether or not that was dissolved and settled between yourself and Mr. Guy.

Mr. GRIMSTAD.—That is objected to as improper under the pleadings in this case; no allegation to that effect.

The COURT.—No proof of any partnership. The objection sustained.

Exception noted and allowed.

Some time after it was done, I knew of the transaction whereby Dr. Guy gave his note for the sum of \$8,200.00 in payment of the original indebtedness that was owed the bank. I think I met you the fore part of this year in Seattle. I think I knew that the National Bank of Montana sold these notes to Dr. Guy and that he had given his note for them. I knew it, but not at the time it was done. I knew it about the time this suit was commenced. I don't know just the exact date. I never told Dr. Guy to do this, or did I give him any instructions, and I have no knowledge of the transaction before it took place. I am acquainted with the market value in 1917 and 1918 of the ranch securing these notes. I judge it is worth around \$50,000.00.

Mr. GRIMSTAD.—The defendant will admit that there was a water right pertinent to this land; that this water right was pertinent to the land securing the notes in controversy and amounting approximately to one thousand inches. On account of the admission Exhibit 4 is withdrawn.

(Testimony of Tisdale I. Van Atta.)

I am still owner of one-half of these Morley notes. I never received any notice of the sale of these collateral notes, which sale the pleadings show took place on the 23d day of January, 1917. The entire transaction took place while I was out of the State, and I have never received any notice. The first time I learned the bank had sold these notes and foreclosed the mortgage securing the Morley notes, I think was in Seattle when you (Mr. McCue) told [44] me. That was prior to the commencement of this action.

Cross-examination by Mr. GRIMSTAD.

That was the first time that I remember of knowing that Dr. Guy had taken over all of those securities. I do not keep a record of all my letters.

Mr. GRIMSTAD.—Have you the letters that we made a demand on you for, Mr. McCue?

Mr. McCUE.—No, I have not. I have all the letters that I could find involved in this matter I produce. They served a notice on me yesterday at which time my client had left Seattle. I produce, pursuant to your notice, all that I had in my possession, which is a letter written—one written by Mr. Langworthy, as cashier of The Bank of Montana on March 13, 1915, and another one written by the same party on March 27, 1915, and those are the only letters I have, and I produce them pursuant to your notice.

Exhibit 5 contains my signature. This is the letter that I wrote to Mr. Langworthy.

Exhibit 5 is offered in evidence, admitted and read to the jury and is as follows:

Defendant's Exhibit No. 5.

HOTEL COEUR D'ALENE.

Howard and Trent Ave.

SPOKANE, WASH.

"THE HOTEL WITH A PERSONALITY."

Spokane, Wash., Aug. 27, 1916.

Mr. B. S. Langworthy, Cash'r,

The Bank of Montana,

Billings, Montana.

Dear Mr. Langworthy:

I expect to meet Dr. Guy here next Saturday and I have a plan which, if I am successful in carrying thru, will let us all out on the deal.

In order that I may be fully equipped to cope with the situation, I will ask you to mail me a detailed account of how matters stand there, at your bank, between you and Guy and also between you and Guy & Van Atta, and also between you and myself. As I understand the matter, however, it is all *ill*uminated by Guy giving you his note for the whole thing. Is this correct? If so, has he ever paid anything on it? How much is due on the matter at this time? Has Morely ever paid anything? Have you started [45] foreclosure proceedings, and when? How much time does he have to redeem? If you will kindly give me all this information and

(Testimony of Tisdale I. Van Atta.)

as much more as possible, I will appreciate it very much, indeed.

I am,

Yours sincerely,

(Signed) T. I. VAN ATTA.

P. S.—I am enclosing addressed envelope,—Hotel Rosalina, Rosalina, Wash.

Q. Mr. Van Atta, you knew, then, on August 27, 1916, that Dr. Guy had given his note to the Bank of Montana, to take up this indebtedness of yours, did you not?

A. Well, may I see that letter, please?

Q. Yes, sir.

A. Yes, I did, then; I knew that; yes, sir.

Exhibit 6 is offered in evidence, admitted and read to the jury and is as follows:

Defendant's Exhibit No. 6.

HOTEL WASHINGTON ANNEX.

SEATTLE, WASH.

8/17/15.

Grimstad & Brown,

Billings, Montana.

Dear Sirs:

Your favor of the 14th inst. at hand.

This is the first I have heard of the "foreclosure" you mention. Will you kindly advise me as to the *amount* for which the "foreclosure" was made?

Also if you know whether Mr. Morley paid all taxes last year, including the irrigation tax? Also did he pay the interest on the Larson mortgage, which became due Apr. 17, 1915.

(Testimony of Tisdale I. Van Atta.)

Also kindly advise me as to how long a period the summons, in question, has to be advertised. I wish to thank you in advance for all this information and which I trust you may see fit to give me at an early date.

Yours very truly,

(Signed) T. I. VAN ATTA.

P. S.—Will you also kindly advise me as to what has been done with the Guy attachment?

That letter was written to the firm of Grimstad & Brown. I have not the letter with me. [46]

Q. To refresh your memory, Mr. Van Atta, I hand you here Exhibit No. 7, and ask you whether or not that is not a copy of the letter you received about that time.

Mr. McCUE.—We object to that inquiry as to the copy for the reason that the exhibit purports to be secondary evidence and incompetent. We will say to the Court at this time that we had no notice of these letters until day before yesterday, and last night or yesterday, notice was served upon us, and it was utterly impossible for us to get the letters; if they were, they were in existence in Seattle and my client had left Seattle and I knew nothing of them; I couldn't get them here if we had them.

The COURT.—You may inquire. We will see later.

Objection is overruled.

Q. That on August 14, 1915 you received a letter from Grimstad & Brown. Was this a copy?

A. No doubt it was.

(Testimony of Tisdale I. Van Atta.)

Mr. GRIMSTAD.—We made demand on the plaintiff for the production of the original letter of which this is a copy according to the witness on the stand, and inasmuch as the original is not here, we now offer in evidence Exhibit No. 7.

Mr. McCUE.—For the purpose of the record, on the demand I wish to state that the original notice was served upon me as counsel for plaintiff in this action, referring to the particular letter, demanding its production, was last night; that the demand was served too late, and we were unable to produce the letter if we had it; we don't know anything about the letter and can't produce it.

The COURT.—It is admitted as a carbon copy in one aspect it is a duplicate, which the defendant might be justified [47] in believing that—all correspondence—certainly can't be very voluminous—relating to this transaction had been brought to the plaintiff, and there is a principle, sometimes adhered to, that oral evidence is permissible when documents sometimes are without jurisdiction. Under all the circumstances, objection overruled.

Exhibit 7 was offered in evidence, admitted and read to the jury, and is as follows:

Defendant's Exhibit No. 7.

August fourteenth,
Nineteen fifteen.

Mr. T. I. Van Atta,
1107 Lakeside Ave.,
Seattle, Washington.

Dear Sir:

We have your favor of the 11th relative to your indebtedness to the Bank of Montana and Mr. Langworthy has also referred to us your letter to him about the same matter.

In this connection we wish to advise that the Guy and Van Atta interests in the Forsyth notes were foreclosed by the Forsyth Bank some two weeks ago, at which time the writer bid them in for the Bank of Montana, who now owns the same. This action is the direct result of your delay and it does not look now as if you would be able to recover anything at all from your equity.

The matter of giving a new note is at this time immaterial and the writer does not therefore need to discuss the question of interest spoken of in your letter. If there is anything further which you would like to know we will be pleased to give you the information. We have started publication of summons in the cases in which the Great Falls property is held under attachment and you will no doubt receive a copy of the complaint by the time this letter reaches you.

Yours very truly,
GRIMSTAD & BROWN.

By _____

RB-H.

Exhibit 8 is a letter I wrote to B. S. Langworthy on the 11th day of August, 1915.

Exhibit 8 is offered in evidence, admitted and read to the jury and is as follows: [48]

Defendant's Exhibit No. 8.

HOTEL SAVOY.

SEATTLE.

Twelve Stories of Solid Comfort.

(Rubber Stamp:)

Aug. 14, 1915.

8/11/125.

Mr. B. S. Langworthy, Cashr.,

The Bank of Montana,

Billings, M't.

Dear Sir:

I am writing to know of general conditions, and of our interests in particular. I am anxious to know if Morley paid his interest to 1st Nat. of Forsyth, as I presume you know and also if he has good crops. I am anxious to know if prospects are good for him to make his payments so that he will meet *all* obligations this fall.

Also will you kindly let me know what my obligations to you figure up to *to* date and greatly oblige

Yours very truly,

(Signed) TISDALE I. VAN ATTA,

1107 Lakeside Ave.

Exhibit 9 contains my signature; it is a letter written to Grimstad & Brown.

Exhibit No. 9 is offered in evidence, read to the jury, and is as follows:

(Testimony of Tisdale I. Van Atta.)

Defendant's Exhibit No. 9.

HOTEL SAVOY.

SEATTLE.

"Twelve Stories of Solid Comfort."

8/11/15.

Grimstad & Brown, Attys.,

Billings, Montana.

Dear Sirs:

I have delayed answering your kind favor of 6/28/15 as I have been endeavoring to get my affairs with Dr. Guy around in better shape. I note you say that the interest was figured at 12% on the note from maturity, etc. I have a letter from Mr. Langworthy, Cashr. Bank of Montana, to the effect that in consideration of my making the assignment of my interest in ranch notes to secure them, that they would only charge me 8% interest straight thru. I think Mr. Langworthy will remember this and if not he can refer to his letter files. The date of his letter was 3/27/15.

Kindly let me know regarding this at your earliest convenience and oblige

Yours very truly, [49]

T. I. VAN ATTA.

1107 Lakeside Ave.

P. S.—He also stated in one of his letters that, for the same reason, *your* charges in the matter would be very reasonable.

Q. Now, Mr. Van Atta, according to these letters, then, you on or about August, 1916, and also in August, 1915, did know that Dr. Guy had given to

(Testimony of Tisdale I. Van Atta.)

the Bank of Montana his personal note for over \$8,000.00 in payment of your note and his indebtedness to the Bank at that time and had taken over this collateral; isn't that true?

A. When did he give that note, may I ask?

Q. He gave it on July 27, 1915.

A. Well, I don't think my letters here refer to that, do they?

Q. No, but the letters refer, do they not, Mr. Van Atta, to the fact that you did know that a foreclosure had taken place of your interest in the Morley notes. A. Not a foreclosure.

Q. Referring particularly to Exhibit 7, which is dated August 14, 1915, a letter by our firm to yourself in answer to your letter, we make this statement to you: "In this connection we wish to advise that the Guy & Van Atta interests in the Forsyth notes were foreclosed by the Forsyth Bank some two weeks ago, at which time the writer bid them in for the Bank of Montana, who now owns the same."

A. Yes, I knew of that foreclosure. Exhibit No. 10 is a copy of the letter I received in reply to my letter of August 27, 1916.

Exhibit No. 10 is offered in evidence, read to the jury and is as follows:

Defendant's Exhibit No. 10.

August thirty-first,
Nineteen Sixteen.

Mr. T. I. Van Atta,
Rosalina,
Washington.

Dear Sir:

Mr. Langworthy has handed us your letter of August 27th, [50] to answer.

The only answer that we can make as the matter now stands, is that Dr. Guy was indebted to The Bank of Montana for about \$8,000.00 and as security for that Dr. Guy put up with the Bank of Montana, the Morley notes. Dr. Guy failed to pay the note when due and the collateral was then sold and bid in by the Bank, so that, as it now stands, the Bank is the holder of the Morley notes. Of course, if you or Dr. Guy desire to pay off this note the Bank will be glad to surrender to you all the securities.

We are about to start suit for the foreclosure of the first mortgage on the Morley ranch as well as the second mortgage, as Mr. Morley has failed to pay the interest on either of them.

It will take about \$8,000.00 besides some costs to clean the matter up with the Bank of Montana at this time.

Yours very truly,
GRIMSTAD & BROWN,
By_____.

OKG-H.

I must have known in 1916 that the Bank of Mon-

(Testimony of Tisdale I. Van Atta.)

tana had taken Dr. Guy's note for approximately \$8,000.00.

Q. Yes, in your letter of August 27, 1916, you say, "As I understand the matter, however, it is all eliminated by Guy giving you his note for the whole thing." You knew then a considerable time before you saw Mr. McCue in Seattle, or in Washington some place, that your interests in these notes had been foreclosed or sold out under the collateral pledge agreement, did you not?

The COURT.—Sold out under what agreement?

Q. Under the agreement, pledge agreement, with Dr. Guy and also the pledge agreement with the First National Bank of Forsyth.

Mr. McCUE.—At this time we object to this line of evidence as being incompetent, immaterial, and there is no proper evidence going to show that any foreclosure was ever made as outlined in the evidence thus far, and is calling for conclusion, opinion, of the witness on a matter that is not within the issues of this case, and also that the inquiry is not proper cross-examination.

The COURT.—He testified he did not know until he met counsel of plaintiff, and his ownership, that is one of the main issues in the case. The question [51] is proper cross-examination. He may answer.

Overruled.

I did not understand that I had been sold out my interests in those notes that the Forsyth Bank. I supposed that the Bank of Montana just took them over. I am supposed to understand the English

(Testimony of Tisdale I. Van Atta.)

language. I understand what the letter says. I knew that the Bank of Montana had taken the notes from the Bank of Forsyth, but I supposed that the Bank of Montana was looking after my interests as they agreed to do. I expected the Bank of Montana to take over those notes, that is what I thought they had done.

Q. This last exhibit reads as follows: "The only answer that we can make, as the matter now stands, is that Dr. Guy was indebted to the Bank of Montana for about \$8,000.00 and as security for that Dr. Guy put up with the Bank of Montana the Morley notes. Dr. Guy failed to pay the note when due and the collateral was then sold by the Bank, so that, as it now stands, the Bank is the holder of the Morley notes." You know on that date, or a few days after that, that the Bank of Montana had taken over the Morley notes from Dr. Guy, did you not?

Mr. McCUE.—Objected to as argumentative and incompetent and intended to place a construction upon a plain letter.

The COURT.—He can answer if he can; objection overruled. I think he will make more progress if he can rely on the language of the letter.

I understand this letter and think I understand the English language. Prior to 1914 Dr. Guy and myself operated a ranch in Rosebud County, Montana. It was operated by Dr. Guy and myself, and carried on under a partnership agreement at the time we were partners, and carried on a bank account in the partnership name, also borrowed some money in the

(Testimony of Tisdale I. Van Atta.)

name of the partnership. We sold the ranch in 1914 but never settled up our differences.

Q. Never got a settlement? A. No, sir. [52]

The notes in question here were really owned by me and Dr. Guy as partners, resulting from the sale of the ranch. In addition to the notes Dr. Guy and I at one time owned a house in Great Falls. During the latter part of 1914 I owed the Bank of Montana a note for \$1,000.00 and another note for \$650.00. They were my personal notes and I think Dr. Guy and I owed a note for \$1,500.00. The sum total of these notes was about \$3,150.00. In 1914 Dr. Guy and I were indebted to the First National Bank of Forsyth but do not know how this indebtedness was paid. I never received the original note back from the Bank of Forsyth. I knew that the Bank of Montana paid the First National Bank of Forsyth on July 27, 1915. I think I knew that a short time afterwards. I don't recall whether Dr. Guy signed the pledge agreement. We put up the Morley notes as collateral security with the First National Bank of Forsyth. I think I know the signature on Exhibit No. 11 and that it is signed by Dr. Guy. He was my partner at that time.

Exhibit No. 11 is offered in evidence, read to the jury and is as follows:

Defendant's Exhibit No. 11.

We have transferred and delivered to the First National Bank of Forsyth, as collateral security, for the payment of this and of any other liabilities of

the undersigned to said Bank, due or to become due, or that may hereafter be contracted, the following property, value of which is Eleven Thousand Five Hundred Thirty-five Dollars, viz:

Five notes dated June 12th, 1914 in favor of Guy and Van Atta and signed by Mike Morley and Louisa Morley, amounting to Eleven Thousand Five Hundred Thirty-five Dollars.

And the Undersigned hereby give the payee and its assigns, authority to sell the said property, or any part thereof, or any substitutes therefor, and all additions thereto, on the maturity of the above note, or at any time thereafter, or before, in the event of the said securities depreciating in value, at any public or private sale, without advertising the same, or demanding payment or giving notice, with the right to said Bank and its [53] themselves to be the purchasers. And, after deducting all costs and expenses, to apply the residue to the payment of any, either or all liabilities as aforesaid, as said payee, or its President, Cashier, or assigns shall elect, returning the overplus to the undersigned; and in case the proceeds of the sale of said property shall not cover the principal, interest and expenses, the undersigned engages to pay the deficiency forthwith after such sale, with legal interest.

(Signed) GUY and VAN ATTA.

By W. F. GUY.

March 22, 1915.

Exhibit 12 contain my signature. It is the original complaint filed in this case.

Exhibit 12 is offered in evidence, read to the jury and is as follows:

Defendant's Exhibit No. 12.

In the United States District Court, of the State
of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

COMPLAINT.

The plaintiff for a cause of action against the defendant states:

I.

That the plaintiff is a citizen and resident of the State of Washington with his place of abode and domicile in Seattle in such state. That the defendant is a banking corporation organized and existing under the National Banking Act of the United States with its principal place of business located at Billings in the State of Montana and that the domicile of such defendant is at Billings in the State of Montana.

II.

That on the 27th day of June, 1914 and for some time prior thereto, the plaintiff and one W. F. Guy had the possession of and were joint owners of the following described promissory notes, to wit: one note dated June 12th, 1914 due December 1, 1914 for \$600.00; one other note dated June 12th, 1914 due December 1, 1914 for \$300.00; one note dated June

12th, 1914, due October 1, 1915 for the sum of \$2,035.00; one other note dated June 12, 1914, due October 1, 1914, for \$2,000.00; one other note dated June 13, 1914 due October [54] *due October 1, 1922*, for \$6,600.00, all of said notes being executed and delivered to the above named parties by Mike Morley and Louisa Morley, his wife, which promissory notes were secured upon certain ranch property located in Rosebud County, Montana, as evidenced by a mortgage of even date with said promissory notes which mortgage was filed for record in the office of the county clerk and recorder of Rosebud county at or about the time of the date of said promissory notes and recorded in book six (6) of mortgages at page 389, records in the office of such County Clerk & Recorder.

III.

That on or about the 27th day of June, 1914, the plaintiff and one W. F. Guy deposited the promissory notes described in paragraph two of this complaint, as a pledge with the First National Bank of Forsyth, Montana, to secure two promissory notes executed by the plaintiff and the said Guy to such bank, one of said promissory notes amounting to the sum of \$3,845.00 dated June 22, 1914, and the other promissory note being for the sum of \$250.75.

IV.

That on or about the 2d day of April, 1915, the plaintiff was indebted to the bank of Montana of Billings, Montana, on account of two promissory notes he had executed to such bank, one note for the sum of \$1,000.00 and the other promissory note being for

the sum of \$650.00; that at said time the plaintiff entered into an agreement with the Bank of Montana aforesaid, whereby he pledged his interest in the Morley notes described in paragraph two of this complaint subject to the rights of the First National Bank of Forsyth, Montana, to the Bank of Montana of Billings, Montana; that some time afterwards, the Bank of Montana, of Billings, Montana, purchased from the First National Bank of Forsyth, the two promissory notes described in paragraph three of this complaint and thereby succeeded to all of the rights of the First National Bank of Forsyth, Montana, in and to the pledged promissory notes described in paragraph two of this complaint.

V.

That on or about the 27th day of July, 1915, said Bank of Montana of Billings, Montana, thru its agents and officers, colluded and connived with the said W. F. Guy with the intent and purpose of defrauding this plaintiff out of his rights and interest in and to the pledged property described in paragraph two of the complaint through which collusion and connivance the said Bank of Montana did surrender and deliver to the said W. F. Guy the said promissory notes described in paragraph three of this complaint and also the two promissory notes executed by the plaintiff to the said Bank of Montana, for the sum of \$1,000.00 and \$650.00 respectively and also a certain other note for the sum of \$1,500.00 executed by the firm of Guy & Van Atta to said Bank of Montana, such promissory notes being all of the promissory

notes for which the promissory notes described in paragraph two of this complaint had been pledged and they were at said time all of the promissory notes, the payment of which was secured by the pledge aforesaid; that by reason of the same, the said W. F. Guy became the owner and holder of all of such promissory notes; that at the time of this transaction between the said Bank of Montana and the said W. F. Guy, the said Bank of Montana delivered to the said Guy, all of the promissory notes described in paragraph two of this complaint, which were pledged as aforesaid and at or about said time, said Bank of Montana, accepted in payment for all of the debts and obligations hereinbefore described, the individual note of the said W. F. Guy for the sum of \$8,221.36 and at said time the said W. F. Guy for the purpose of securing the said promissory note of \$8,221.36 re-placed all of the note described in paragraph two of this complaint. [55]

VI.

That at the time of the pledging of said promissory notes, as set forth in paragraph five hereof, the said Bank of Montana had full knowledge and was fully cognizant of the fact that such promissory notes were the joint property of this plaintiff and the said W. F. Guy and that they were partnership property; That said pledge by the said Guy as described in paragraph five hereof was made without any knowledge of plaintiff or without his consent or any authority from him authorizing the said Guy to make such pledge for his individual indebtedness and that

such pledge was made without any authority, notice or knowledge of this plaintiff.

VII.

That during all the time mentioned hereinbefore the Bank of Montana of Billings Montana, was Banking corporation duly existing and incorporated under the laws of this State and that some time prior to the 16th day of January, 1917, it became nationalized and was converted from a State Bank into a National Bank under the name of The Montana National Bank of Billings, Montana.

VIII.

That on or about the 23d day of January, 1917, with the further intent and purpose of defrauding and depriving plaintiff out of his right and interest in and to the property described in paragraph two of this complaint, defendant did make a pretended sale of all of such property to satisfy the individual promissory of the said W. F. Guy for the sum of \$8,221.36 and at such pretended sale the defendant purchased the aforesaid pledged property; that by reason thereof the defendant claimed it owned all of such property, being the promissory notes described in paragraph two of this complaint; that afterwards by reason of such collusion, connivance and fraud perpetrated upon this plaintiff, it foreclosed the mortgage against said Mike Morley and his wife upon the land described in such mortgage and thereby extinguished such notes; that afterwards the defendant obtained a sheriff's deed in such foreclosure and thereby became the owner of said land; that afterwards the defendant manipulated

said land and sold same whereby it realized the whole face value and interest thereon, of the promissory notes described in paragraph two of this complaint.

IX.

That at all times mentioned herein this plaintiff was the owner of an undivided one-half interest in and to the promissory notes described in paragraph two of this complaint and also in the mortgage securing same and that at the times of the transactions hereinbefore described between the said Bank of Montana and the said W. F. Guy the said bank well knew of this plaintiff's ownership thereof and interest in the said promissory notes described in paragraph two of this complaint; that the plaintiff is still the owner of an undivided one half in and to the promissory notes described in paragraph two of this complaint and in the mortgage securing same.

X.

That by reason of the facts hereinbefore alleged and set forth, the defendant has converted to his own use all of the promissory notes described in in paragraph two of the complaint, together with the mortgage securing the same; that the plaintiff is still the owner of an undivided one half interest therein and is the owner of an undivided one-half interest in and to all of the earnings and [56] accretion thereto derived by the defendant from such property; that the value of this plaintiff's interest therein was on the 12th day of June 1914, the sum of \$5,767.50 and that the present value of plaintiff's interest therein is the sum of \$5,767.50 together with

interest thereon at the rate of 7 per cent per annum payable annually from and since the 12th day of June 1914.

XI.

That prior to the commencement of this action the plaintiff duly demanded of the defendant an undivided one-half interest of the property so converted as described in this complaint and that the defendant has refused to deliver the plaintiff his rights and interest in such property.

WHEREFORE the plaintiff demands judgment against defendant for the sum of \$8,150.00 together with his costs and disbursements herein.

Dated this 21st day of February, 1920.

T. F. McCUE,

Attorney for Plaintiff.

Exhibit 12 is duly verified by the plaintiff.

At the time I signed the complaint I understood that the notes in controversy were partnership property; that they belonged to me and Guy as partnership property and they still do belong to me and Guy as partnership property. These Morley notes were secured by a second mortgage on the ranch. I think there was a first mortgage on the ranch for \$10,000.00. I don't know whether Morley paid the interest or not. I do not recall that I knew that the first mortgage had been foreclosed, but of course I knew that it had been taken care of by the Bank as I understood it. I received no notice that the action had been started to foreclose the first mortgage, and I made no inquiry about the foreclosure of the first mortgage. I don't know whether I made an inquiry. I don't re-

(Testimony of Tisdale I. Van Atta.)

call when the first mortgage matured. I do not know whether the period of redemption under the foreclosure of the first mortgage has expired.

Q. Mr. Van Atta, if the first mortgage had been foreclosed and the period of redemption has expired, then the value of your securities securing on the second mortgage aren't worth much, are they?

Mr. McCUE.—Objected to, immaterial, assuming facts not in the record, incompetent, immaterial.

The COURT.—He may answer, overruled. [57]

A. Well, that had been taken care of, as I understand it. I don't know, but I was under the impression that the Bank took it over, took over the mortgage; I don't know how. I refer to the Bank of Montana. I can't recall when I first learned that the Bank of Montana had taken over the property. I don't know when I learned of the foreclosure of the first mortgage.

Q. Did you redeem under the sale of the first mortgage?

Mr. McCUE.—Objected to, incompetent, immaterial and irrelevant; furthermore, there was no obligation in view of the records in this case, the plaintiff's notes having been converted, no obligation for him to redeem.

The COURT.—He may answer.

Exception noted and allowed.

A. No,

Q. You never made any effort to, did you?

Mr. McCUE.—Same objection as above.

The COURT.—Like ruling.

(Testimony of Tisdale I. Van Atta.)

Exception noted and allowed.

A. No, sir.

Q. Did you ever inquire as to what amount it would take to redeem?

Mr. McCUE.—Same objection as last above.

The COURT.—I doubt whether the details are material. He may answer.

Mr. McCUE.—Note an exception.

A. I don't recall.

The COURT.—It goes to the question of diligence, if that becomes material.

Redirect Examination.

(By Mr. McCUE.)

Q. Counsel had you to reply that you knew about the foreclosure that the First National Bank of Forsyth made. What did you mean by "foreclosure"? Did you understand and know any foreclosure had been made by the First National Bank of Forsyth of this [58] matter?

A. I understood, as I stated; I understood that the Bank of Montana had taken over those papers or securities from the First National Bank of Forsyth. Inasmuch as they had— May I say this, your Honor?

The COURT.—Proceed.

A. (Cont'd.) Inasmuch as they had agreed to protect me and take care of my interests—

Mr. GRIMSTAD.—To which we object when the agreement between him and the bank protecting his interests is not in question, nothing in writing shown, and nothing here to indicate that the plain-

(Testimony of Tisdale I. Van Atta.)

tiff is suing for an accountable wrong of any rights he may have had.

The COURT.—Objection will be sustained.

The Great Falls property was settled between Dr. Guy and myself.

Q. Have you got any accounts pending now, any partnership that is, accounts with any bank in the name of the firm, or did you have at the time of the commencement of this action?

Mr. GRIMSTAD.—Objected to as incompetent, irrelevant and immaterial, not proper redirect examination.

The COURT.—Sustained.

Exception noted and allowed.

The property we had in Great Falls was real estate. With the exception of my owning one-half of the notes in controversy, we had no other matters pending with reference to the partnership that existed in 1914 that was unsettled. We had no matters outside of the ranch matter. The only partnership that ever existed between Dr. Guy and myself was in relation to this ranch in Rosebud County, and I said that we owned real estate in Great Falls in partnership, that was property we took as part of the first payment on the ranch. Dr. Guy owned one-half of this property and I owned the other half. The deed ran to us jointly. That was disposed of before the commencement of this suit. [59] The Great Falls property was settled up between Dr. Guy and myself. There was no other

(Testimony of Tisdale I. Van Atta.)

partnership business between Dr. Guy and myself, as I recall. At the time that this suit was commenced, the only thing pending was my claim of one-half of these notes in controversy, and the further fact that I owed Dr. Guy on my individual notes, the Bank of Montana notes. I owed fifteen hundred dollars on these notes individually and not as a partnership, and when I stated that the partnership still owed these notes it was with reference to my understanding of the matter as I now explained.

Testimony of Dr. W. F. Guy, for Plaintiff.

Dr. W. F. GUY, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. McCUE.)

My name is W. F. Guy. I reside in Great Falls; am a dentist by profession. I am the W. F. Guy who one time was one of the owners of the Morley ranch in Rosebud County, this State, in partnership with Mr. Van Atta. We owned it together. I owned a one-half interest and Mr. Van Atta owned the other half, in common. I was present at the time *that the present at the time that* the notes owned by myself and Van Atta were turned over by the First National Bank of Forsyth to the Bank of Montana. Mr. Brown, of the firm of Grimstad & Brown, and Mr. Meyerhoff of the Bank of Forsyth were also present. During this time I was per-

(Testimony of Dr. W. F. Guy.)

sonally acquainted with Mr. Langworthy, the Cashier of the Bank of Montana. Previous to going down to Forsyth, I had a conversation with Mr. Langworthy, with reference to the Morley notes.

Q. Tell the jury what was said between yourself and Mr. Langworthy.

Mr. GRIMSTAD.—That is objected to, incompetent, irrelevant and immaterial.

The COURT.—What is the object of this?

Mr. McCUE.—The object, if your Honor please, is that in the pleadings and, in a way, in cross-examination [60] it has been claimed by the defendant in this case that there was a sale, a foreclosure in that transaction, and our contention being that the Bank of Montana merely succeeded to the interests of the First National Bank of Forsyth that it did not in fact constitute a foreclosure or an extinction of the title to the collateral security in the plaintiff.

The COURT.—The objection will be sustained.

Exception noted and allowed.

Q. What was done when you got down to the First National Bank of Forsyth by yourself and Mr. Brown, a member of the firm of Grimstad & Brown, representing the Montana National Bank,—Bank of Montana, and the officers of the Bank, and the First National Bank of Forsyth?

Mr. GRIMSTAD.—Objected to as immaterial.

The COURT.—The objection will be sustained, if ever anything of that sort will be material, it is not now.

(Testimony of Dr. W. F. Guy.)

After my return from Forsyth, I went over to the Bank of Montana by prearrangement.

Q. What was done there, if anything, with reference to the notes involved in this lawsuit.

Mr. GRIMSTAD.—That is objected to, incompetent, irrelevant and immaterial.

The COURT.—What is the object of this?

Mr. McCUE.—I want to show the actual transaction that took place, along the line that we contend for in this lawsuit, that the taking over of the notes by this witness and the repledging of them was a transaction without any sale and still preserved the title in the plaintiff to the notes in question.

The COURT.—I find nothing in your complaint. [61] You start off with the fact that these two men owned these notes and that this plaintiff pledged them for his debt.

Mr. McCUE.—That is true; we take it this is a part of the evidence?

The COURT.—Proceed; objection sustained to the last question.

We got back to Billings on the 27th day of July, 1915, about noon. By prearrangement, after these notes came back from Forsyth, I was to meet Mr. Langworthy by agreement and these notes were all to be transferred over to me, along with Mr. Van Atta's personal notes, and also the notes of Guy and Van Atta at the Forsyth Bank, consisting of two notes, and these notes were to be turned over to me, and also the Morley notes were to be turned over to me by the Bank of Forsyth, consisting of two notes.

(Testimony of Dr. W. F. Guy.)

These notes were to be turned over to me, and also the Morley notes were to be endorsed by the Bank of Montana to me as an individual, and for those considerations, the consideration of them giving me full title, signing over to me without recourse these Morley notes, and also the Guy & Van Atta notes, I was to give them my personal note for eight thousand dollars. I executed the note for \$8,000.00 and some hundred dollars, and at this time I received all the notes that were owed individually by the plaintiff in this case. I know where these notes are now. My wife, Mrs. W. F. Guy is the owner and holder of these notes and they are unpaid. The notes were marked for identification, Exhibits 14 to 19, inclusive. I was acquainted with Mr. Langworthy at the time he was cashier of the Bank of Montana, and I am also acquainted with his signature. The signature on Exhibit 19 is Mr. Langworthy's signature. Exhibit 19 was delivered to me on or about the date it bears. Exhibit 14 is signed by Mr. Langworthy. It was also delivered to me at or about the date it bears. [62]

Exhibit 15 also contains Mr. Langworthy's signature and was delivered to me at or about the date it bears.

Exhibits 14, 15 and 19 are offered in evidence.

Mr. GRIMSTAD.—Defendant objects, of course, to the amendment, bringing in an entirely new cause of action which we did not have to provide ourselves against; no allegation in the complaint; the complaint would be against the Montana Na-

(Testimony of Dr. W. F. Guy.)

tional Bank and not against the Bank of Montana. Objected to at this time.

The COURT.—What do you mean by “Successor” again? That is a legal conclusion of some sort; it might mean many different things; a successor is not always responsible for the torts of a predecessor, if that is what your moving alleged.

Mr. McCUE.—I move to amend the complaint to show that the defendant succeeded to all of the rights of the Bank of Montana in these notes and, as a matter of fact, that the defendant later on did sell these notes. It seems to me, if the Court please, that that is only a matter of proof. We alleged that this defendant did convert them and we are going to show that the conversion took place after this transaction by the defendant. It seems to me that it is only just a chain in the matter of proof, to show that they succeeded to the rights of the Bank of Montana, because afterwards the defendant did in fact make the sale that we allege to constitute a conversion in this action.

The COURT.—You are confronted by a pleading that does not bear you out. You have got to plead your case. Now, you say you want to show—succeeded; now what do you mean? Some successors might be liable, others not; it depends entirely upon the nature of the succession. What do you propose to plead?

Mr. McCUE.—I propose to plead that the Bank of Montana was converted in the Bank of Montana—the [63] First National Bank, and that the

(Testimony of Dr. W. F. Guy.)

National Bank of Montana succeeded to the rights of all of the property that was belonging to the Bank of Montana, and that this particular transaction in the pledging, or attempted pledge by the witness Guy was made to the Bank of Montana; that afterwards the Montana National Bank, this defendant, succeeded to all the rights and interests that the Bank of Montana had in these notes; and then the allegation that the National Bank of Montana converted these notes is correct. That is what we propose to show. In other words, all I wish to amend the complaint, instead of alleging that the transaction and the deposit of these Morley notes was made by the defendant, that they were made with the Bank of Montana, and that afterward the First National Bank—or the Bank of Montana was converted into the National Bank, the defendant, and that the defendant succeeded to all the rights in this paper, and ratified the transaction heretofore made and afterwards sold them under the collateral agreement given; and that is the conversion that we rely on. It seems to me it is only a matter of evidence anyhow, leading up to a matter that we can show the conversion.

The COURT.—I am of the opinion that this cannot take the defense by surprise. Unless some showing of that is made to the contrary, the amendment is allowed. You can prepare it in writing in due time. Proceed with your examination.

Mr. McCUE.—That is, the proposed amendment?

The COURT.—Yes. The objection to the offer is overruled.

Exception noted and allowed. [64]

Exhibit 14 is read to the jury and is as follows:

Plaintiff's Exhibit No. 14.

BANK OF MONTANA.

Billings, Mont., July 27, 1915.

RECEIVED OF W. F. Guy note of T. I. Van Atta for \$1000.00 due Dec. 1, 1914. Note of Guy & Van Atta for \$1500.00 due July 27, 1914 and note of T. I. Van Atta for \$650.00 (on which \$6.00 is endorsed) due October 28, 1914.

Said notes have today been paid by W. F. Guy by new note. We hold said notes as long as necessary for the prosecution of a certain suit for the benefit of W. F. Guy against T. I. Van Atta against certain real estate in Great Falls, Montana, now in suit.

B. S. LANGWORTHY,

Cashier.

Exhibit 15 is read to the jury, and is as follows:

Plaintiff's Exhibit No. 15.

It is hereby understood and agreed by and between the BANK OF MONTANA, a corporation of Billings, Montana, and Dr. W. F. Guy, of Great Falls, Montana: That whereas, the Bank of Montana has instituted legal action against one T. I. Van Atta and against Van Atta and W. F. Guy on certain promissory notes, and levied attachment against certain real property belonging to said Van

Atta and Guy; And whereas, said Guy has assumed the entire indebtedness of said Van Atta, individually and said Guy and Van Atta as a partnership and in the assumption of said indebtedness has transferred certain notes signed by Mike and Louise Morley to the Bank of Montana as collateral security:

Now therefore, for and in consideration of the premises, it is understood and agreed that said Bank of Montana will dismiss its action and attachment as to the said Dr. W. F. Guy; that in the event said attached property is sold under execution sale and bid in by said Bank of Montana, the Sheriff's certificate of sale issued thereon will be assigned by said Bank of Montana to said W. F. Guy for his benefit. And the said Guy agrees to pay all court costs accruing from this date which arise from the prosecution of said actions and sale of said property.

In witness whereof the parties to this agreement have hereunto set their hands and seals this 27th day of July, 1915.

THE BANK OF MONTANA.

By B. S. LANGWORTHY,

Cashier.

W. F. GUY.

Exhibit 19 is read to the jury, and is as follows:

Plaintiff's Exhibit No. 19.

THE BANK OF MONTANA.

I have transferred and delivered to The Bank of Montana, Billings, Montana, as collateral security

for the payment of any and all liabilities of the undersigned to said bank due or [65] to become due, or that may hereafter be contracted, the following property, in my right and title, value of which is eleven Thousand, five hundred Thirty-five and no/100 Dollars, viz.:

Makers.	Date.	Due.	Amount.
Note of Mike Morley and Louise Morley	June 12, 1914,	Dec. 1, 1914,	\$600.00
Note of Mike Morley and Louise Morley	June 12, 1914,	Dec. 1, 1914,	300.00
Note of Mike Morley and Louise Morley	June 12, 1914,	Oct. 1, 1915,	2035.00
Note of Mike Morley and Louise Morley	June 12, 1914,	Oct. 1, 1914,	2000.00
CR. Account Pipe for Syphon 12/16/14 applied on interest			
Note of Mike Morley and Louise Morley	June 12, 1914,	Oct. 1, 1912,	6600.00

Received above described notes as collateral July 27, 1915, said notes having all, previous to this agreement, been endorsed by this bank, without recourse, to W. F. Guy and afterwards endorsed by W. F. Guy to this bank.

(Signed) B. S. LANGWORTHY, Cas.

(Printed portion:) And the undersigned hereby gives the said payee and its assigns authority to sell the said property, or any part thereof, or any substitutes, and all additions thereto, on the maturity of any or all my liabilities, or at any time thereafter, or before, in the event of the said securities depreciating in value, at any public or private sale, without advertisement of the same, or demanding payment, or giving notice, with the right to said Bank and its assigns themselves, to be the purchasers; and after deducting all costs and expenses, to apply the residue to the payment of any, either or all liabilities as aforesaid, as said payee, or its President, Cashier, or assigns shall elect, returning the overplus to the undersigned; and in

case the proceeds of the sale of said property shall not cover the principal, interest and expenses, the undersigned engages to pay the said deficiency forthwith after such sale, with legal interest.

Billings, Montana, July 27, 1915.

Exhibit 20 is the note described in Exhibit 19.

Exhibit 20 is offered in evidence, read to the jury and is as follows:

Plaintiff's Exhibit No. 20.

Billings, Montana, Jul. 27, 1915.

No. 3741.

June 1, 1916, after date, for value received, we jointly and severally promise to pay to the order of THE BANK OF MONTANA, BILLINGS, MONTANA, Eighty-two Hundred Twenty-one and 36/100 Dollars (\$8,221.36), AT THE BANK OF MONTANA, BILLINGS, MONTANA, with interest at 8 per cent per annum, payable semi-annually until due, and twelve per cent thereafter; and with all costs of collection, including attorney's fees, if not paid at maturity. Each of the makers hereof and the endorsers herein, waive demand, protest, and notice of nonpayment.

(Signed) W. F. GUY. [66]

P. P. Address:

Great Falls, Montana.

1st Nat. Bank Bldg.

(Pencil Notation): Int. 2/19/18.

\$2,273.66

Secured by

Collateral. (Blue Pencil Notation): 6

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1—
16

Bearing on the back \$1.66 documentary internal revenue stamps, and endorsed:

“Jan. 23, 1917. Paid \$500.00. (By sale of Collateral).” Which endorsement is cancelled, or at least has a wavy pencil mark drawn thru it.

Also endorsed:

“Without recourse. The Bank of Montana, Billings, Mont. N. A. Telyea, Cashier.

Exhibits 21 and 22 are the individual notes of the plaintiff given by him to The Bank of Montana. Exhibits 21 and 22 are offered in evidence. Exhibit 21 is read to the jury and is as follows:

Plaintiff's Exhibit No. 21.

Billings, Montana, Sept. 28, 1914.

No. 2096.

30 Days after date, for value received, we jointly and severally promise to pay to the order of THE BANK OF MONTANA, BILLINGS, MONTANA, Six Hundred Fifty Dollars (\$650.00), at the BANK OF MONTANA, BILLINGS, MONTANA, with

interest at 10 per cent. per annum, payable semi-annually until due, and twelve per cent thereafter; and with all costs of collection, including ATTORNEY'S FEE'S if not paid at maturity. Each of the makers hereof and the endorsers hereon, waive demand, protest, and notice of nonpayment.

(Signed) T. I. VAN ATTA.

(Black lead pencil notation:) 44.71 (with circle around it).

(Red lead pencil notation:) 10

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28

—
14

(Endorsed on back:)

PAYMENTS.

Date of Payment.	Total Paid.	Applied on Interest.	Applied on Principal.	Balance of Principal Unpaid.
10-8-14	6	6	644

(Also endorsed:) "Without recourse,
The Bank of Montana,
Billings, Montana.
N. A. Telyea, Cashier.

(Rubber stamp:) Nov. 13, 1914. Oct. 21, 1914.

Exhibit 22 is read to the jury and is as follows:

Plaintiff's Exhibit No. 22.

Billings, Montana, Jun. 6, 1914.

No. 1638. [67]

December 31, 1914, after date, for value received, we jointly and severally promise to pay to the order of THE BANK OF MONTANA, BILLINGS, MONTANA, with interest at 8 per cent per annum,

payable semi-annually until due, and twelve per cent thereafter, and with all costs of collection, including attorney's fees, if not paid at maturity. Each of the makers hereof and the endorsers hereon waive demand, protest and notice of nonpayment.

(Signed) T. I. VAN ATTA.

P. O. Address:

Howard, Montana.

(Black lead pencil notation:) 0 91.34.

(Red pencil notation:) 12.

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1

—
14

(Endorsed on back:) Without Recourse.

The Bank of Montana,
Billings, Montana.

N. A. Telvea, Cashier.

(Black lead pencil notation, written faintly with circle around:) 40.00.

(Rubber stamp notation:) Nov. 28, 1914.

Besides these notes there was one signed by T. I. Van Atta for \$1500.00, signed Guy and Van Atta, by T. I. Van Atta. These notes and also the Morley notes consisting of \$11,500.00 were endorsed to me and given over to me. Also the original Guy and Van Atta notes held by the First National Bank of Forsyth were turned over to me at the time. At the time these notes were turned over to me there was an action pending on Exhibits 21 and 22 in the District Court of Cascade county

against the plaintiff in this case. That case was afterwards disposed of and settled. There was an attachment issued in that suit. The property was owned by Mr. Van Atta and myself. The obligations and debts of Guy and Van Atta have all been settled. I think they were all settled prior to 1917. We had a settlement settling up all our partnership relations in regard to all debts, and things pertaining to the partnership. We had a settlement prior to 1917, I think. It might also have been the fore part of 1917. The Great Falls property was the last piece of property that our partnership owned. Van Atta sold his interest in that property to my wife. That was about 1917 and that wound up everything in connection with the partnership. The T. I. Van Atta notes that I got from the Bank of Montana and also the note of \$1500.00 signed by T. I. Van Atta are still a claim against Mr. Van Atta and they are not paid. All of the rest of the matters of the partnership business has been cleaned up and adjusted. To my [68] knowledge they were all settled. I was a party to the settlement. There are no outstanding partnership obligations or partnership property between myself and Van Atta unless you consider the Morley notes are not settled. I am not claiming any interest in the Morley notes. My interest in the Morley notes was taken over by the bank. I am making no claim whatever as to any interest in these Morley notes. Exhibit 23 contains the signature of B. S. Langworthy, cashier of the National Bank of Montana.

Exhibit 23 is the notice that was served upon me at or about the date it bears.

Exhibit 23 is offered in evidence, read to the jury and is as follows:

Plaintiff's Exhibit No. 23.

To W. F. GUY,

Great Falls, Mont.

WHEREAS, you have defaulted in the payment of both principal and interest on your certain promissory note dated July 27, 1915, in the sum of \$8,221.36, with interest at eight per cent per annum, payable semi-annually until due and due June 1st, 1918, given to Bank of Montana, Billings, Montana and by it endorsed to the Montana National Bank of Billings, Montana, who is now the owner and holder thereof, and

WHEREAS, on the 27th day of July, 1915, as security for the payment of said note you transferred and delivered to the said Bank of Montana at Billings, Montana, the following notes and claims, to wit:

Note signed by Mike Morley and Louise Morley,
Dated June 12, 1914, due Dec. 1st, 1914, in the sum of \$600, with interest at 7%.

Note signed by Mike Morley & Louise Morley, dated June 12, 1914, due Dec. 1st, 1914, in the sum of \$300, with interest at 7%.

Note signed by Mike Morley & Louise Morley, dated June 12, 1914, due October 1st, 1915, in the sum of \$2,035, with interest at 7%.

Note signed by Mike Morley & Louise Morley, dated June 12, 1914, due October 1st, 1914, in the sum of \$2,000.00 with interest at 7%.

Note signed by Mike Morley & Louise Morley, dated June 12, 1914, due Oct. 1st, 1922, in the sum of \$6,600, with interest at 7%.

One claim against the Yellowstone Irrigation District for work, labor, services and materials in the sum of \$642.50, and

WHEREAS, there is due at this date on your said note the sum of \$9,209.91, no part of which has been paid,—

NOW, THEREFORE, you are hereby notified that the above listed property placed by you with the Bank of Montana, Billings, [69] Montana, as security for this indebtedness, and by said Bank of Montana endorsed to the Montana National Bank at Billings, Montana will be sold to the highest bidder for cash at the place of business of the Montana National Bank at Billings, Montana, on the 23d day of January, 1917, at 10 o'clock in the forenoon of said day, and the proceeds derived from the sale of said property placed by you as collateral security as above stated will be applied as follows, to wit:

I—The payment of all costs, expenses and attorney's fees in making said sale.

II—The balance, if any, will be applied on your indebtedness as above stated.

III—The balance, if any, will be paid to you.

The above notes, together with the above described property to be sold, is in the possession of and be-

longs to the undersigned for the purposes above stated.

Signed and dated at Billings, Montana this 16th day of January, 1917.

MONTANA NATIONAL BANK,

By B. S. LANGWORTHY,

Vice-pres.

I think Exhibit 23 is the only notice that was ever served upon me with reference to the Bank of Montana or the National Bank of Montana offering the Morley notes for sale under any collateral agreement. I never inquired whether they sold the notes under this notice. At the time that I deposited the Morley notes to secure my individual note of \$8,000.00, Mr. Van Atta gave me no instructions with reference to it. According to our agreement I was to deposit all of the Morley notes as collateral security against that note of mine for about \$8,000.00. There was nothing said at the time whether I was depositing anything other than my half interest. I simply deposited all the notes. They had been signed over to me previously to that, and I signed the whole business back to the Bank of Montana and put them up as collateral on the note of mine. It consisted of handing over the notes. I made out my note or they had already; they signed these notes over to me and I made out my note and they signed them over to me and I signed them back to them as collateral. I made no bid of any kind on these notes. I was acquainted with the value of the Morley ranch securing these Morley notes. Was acquainted with its value in 1917 and also 1920. I mean the market value of this land.

[70] This ranch is made up of what they call buffalo sod; there is *no or* gumbo or alkali on the place, it consists of 671 acres, deeded acres, and it was considered by everybody as one of the best ranches on the Yellowstone river. It was considered level. There was a ditch leading to it so it could be irrigated. About 600 acres of this land could be irrigated. The land was considered of the value of \$100.00 an acre. I would say that from 1917 to 1920 the market value of this land went around \$100.00 an acre. I think I know of other land in that vicinity being sold, *with* I think Mr. Meyerhoff sold some land. Mr. Meyerhoff owns land joining ours and I understand was holding it for \$100.00 an acre, and, I think, sold some for \$100.00. He may have sold it all for all I know. This was between 1917 and 1920. The plaintiff offers Exhibit 24, being certified copy of certificate of sale foreclosing the Morley mortgage and notes, together with certificate of the Clerk and Recorder of Rosebud county on the bank of it, with the seal of his office in evidence.

Exhibit 24 is read to the jury and is as follows: There was a first mortgage on the land amounting to \$10,000.00.

Plaintiff's Exhibit No. 24.

SHERIFF'S CERTIFICATE OF SALE ON FORECLOSURE.

I, Henry Grierson, Sheriff of the County of Rosebud, do hereby certify that under and by virtue of an order of sale issued out of the District Court of the Fifteenth Judicial District of the State of Mon-

tana, in and for the county of Rosebud, in the action of the Montana National Bank of Billings, a National Banking Corporation vs. Mike Morley and Louise Morley, his wife, a judgment and decree was rendered on the 5th day of March, 1917, and entered on the 9th day of March, 1917, in judgment book No. 11 of the said District Court on page 531, duly attested the 9th day of March, 1917, and to me, as such Sheriff duly directed and delivered, whereby I was commanded to sell the property hereinafter described, according to law, and to apply the proceeds of such sale towards the satisfaction of the judgment in said action amounting to the sum of Fourteen Thousand three Hundred Sixty and 35/100 dollars (\$14,360.35), lawful money of the United States, which includes principal, interest, taxes, attorney fees and costs of suit, I duly levied on, and on the 14th day of April, A. D. 1917, at 2 o'clock P. M. at the Courthouse door, in the City of Forsyth, in the said county of Rosebud, I duly sold at public auction according to law, and after due and legal notice, to the Montana National Bank of Billings, a National Banking corporation, who made the highest and best bid therefor at such sale, for the sum of Fourteen Thousand Six Hundred Twenty-five and 20/100 Dollars (\$14,625.20) lawful money of the United States, which was the *shole* sum paid by it for the real estate in said order of sale, lying and being *dituate* in the said county of Rosebud, State of Montana and described as follows, to wit: [71]

Northwest quarter of the northwest quarter, and lots numbered three (3), four (4) and five (5) of sec-

tion twenty (20) containing 143.09 acres; also lot numbered eight (8) of section seventeen (17) containing 6.33 acres; also Lots numbered One (1) two (2) three (3), four (4), Five (5), Six (6), seven (7), nine (9), ten (10), eleven (11), and twelve (12), and the South half of the northeast quarter and the north half of the south half of section seventeen (17), containing 515.40 acres. All lying and being in township six (6) north of range thirty-nine (39) east, of Montana Meridian in Montana together with all rights to use the water for irrigating said premises and for domestic use thereon, to which said mortgagors or the premises hereby conveyed are now or may hereafter become entitled, together with all shares of stock or shares of water in any ditch or irrigation company, which in any manner entitled said mortgagors to water for irrigating or domestic purposes upon said lands.

Together with all and singular tenements, hereditaments, and appurtenances thereunto belonging or appertaining.

And I do further certify that the said property was sold in one lot or parcel, and that the sum of fourteen thousand six hundred twenty-five and 20/100 Dollars (\$14,625.20) was the highest bid made and the whole price paid therefor, and that the same is subject to redemption in lawful money of the United States pursuant to the statute in such case made and provided.

Given under my hand this 18th day of April, 1917.

H. GRIERSON,
Sheriff.

W. I. CHURCH,
Deputy Sheriff.

[Endorsed]: 27066. Sheriff's Certificate of Sale.
Montana National Bank vs. Mike Morley et ux.
Filed April 18, 1917, at 11:30 A. M. W. E. Clarke,
County Clerk. By M. M. Stevens, Deputy.

Office of the County Clerk and Recorder,
Rosebud County, Montana,
State of Montana,
County of Rosebud,—ss.

I do hereby certify that the annexed is a correct transcript of the original remaining on file or record in my office, together with the endorsements thereon contained.

Witness my hand and official seal Dec. 17, 1920.

WARREN BUTTERFIELD,
County Clerk and Recorder.
By (Signed) H. O. Callaghan,
Deputy.

Exhibit 25 is offered in evidence, read to the jury, and is as follows:

Plaintiff's Exhibit No. 25.

Clerk's File 37147.

SHERIFF'S DEED.

This indenture made the eighth day of May, 1918, by and between Henry Grierson, Sheriff of the County of Rosebud, State of Montana, the party of

the first part, and The Montana National Bank of Billings, a National Banking Corporation of Billings, [72] Montana, the party of the second part, witnesseth:

Whereas, in and by a certain judgment or decree rendered by the District Court of the said county of Rosebud, State of Montana, on the 5th day of March, 1917, and entered on the 9th day of March, 1917, in a certain action then pending in said court wherein the Montana National Bank of Billings, a National Banking corporation was plaintiff, and Mike Morley and Louise Morley, his wife, were defendants, and of which said judgment or decree a certified copy was delivered to said party of the first part as such Sheriff, for execution, it was among other things ordered, adjudged and decreed, that all and singular, the mortgaged premises described in the said complaint in said action, and specifically described in the said judgment or decree, be sold at public auction by the sheriff of the said county of Rosebud in the manner required by law, and according to the course and practice of said court; that such sale be made at public auction at the front door of the Courthouse, in the City of Forsyth, County of Rosebud, State of Montana; that any of the parties to the said action might become the purchasers at such sale, and that said Sheriff execute the usual certificate and deeds to the purchaser or purchasers as required by law;

And Whereas, the said sheriff did, at the hour of two o'clock P. M. on the 14th day of April A. D. 1917, after due public notice had been given, as required by the laws of this state, and the course and

practice of said court, duly sell, at public auction in front of the Courthouse door in the said County of Rosebud, agreeably to the said judgment or decree, and the provisions of law, the premises in the said decree or judgment mentioned, at which sale the premises in said judgment or decree, and hereinafter described were fairly struck off to the said The Montana National Bank of Billings, a National Banking corporation, for the sum of Fourteen Thousand Six Hundred twenty-five and 20/100 (\$14,625.-20) lawful money of the United States, the said The Montana National Bank of Billings, a national banking corporation being the highest bidder, and that being the highest sum bidden for the same.

And Whereas, the said Montana National Bank of Billings, a National Banking Corporation, thereupon paid to the said sheriff the said sum of money so bid by it:

And Whereas, the said Sheriff thereupon made and issued the usual certificate in duplicate of the sale in due form of law and delivered one thereof to the said The Montana National Bank of Billings, and caused the other to be filed in the office of the County Recorder of the said County of Rosebud, Montana.

And Whereas, more than twelve months have elapsed since the date of said sale, and no redemption has been made of the premises so sold as aforesaid, by or on behalf of the said judgment debtor, the said defendants, Mike Morley and Louise Morley, his wife, or either of them, or by, or on behalf of any person claiming any right, title or interest in or to the said described premises.

Now this Indenture Witnesseth, that the said party of the first part, the said Henry Grierson, Sheriff, in order to carry into effect the sale so made by him as aforesaid in pursuance of said judgment or decree, and in conformity to the statute in such case made and provided and also in consideration of the premises and of the said sum of Fourteen Thousand Six Hundred Twenty five and 20/100 Dollars, so bidden and paid to him by the said purchaser the said The Montana National Bank of Billings, a national banking corporation of Billings, Montana, the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed, and by these presents doth grant, [73] bargain, sell and convey unto the said party of the second part, and to its successors and assigns, forever, all that certain lot, piece or parcel of land, situate, lying and being in the said County of Rosebud, State of Montana, and bounded and particularly described as follows, to wit:

The Northwest quarter of the Northwest quarter, (N.W. $\frac{1}{4}$ N.W. $\frac{1}{4}$) and Lots numbered three (3) Four (4) and five (5) of Section twenty (20) containing 143.09 acres; Also lot numbered eight (8) of Section seventeen (17) containing 6.33 acres; Also lots numbered one (1) two (2), three (3) four (4) five (5) six (6) seven (7) nine (9) ten (10) eleven (11) and twelve (12), and the south half of the northeast quarter (S. $\frac{1}{2}$ NE. $\frac{1}{4}$) and the north half of the south half (N. $\frac{1}{2}$ S. $\frac{1}{2}$) of section seventeen (17), containing 515.40 acres, all being and lying in township six (6) north of range thirty-nine

(39) east of Montana Meridian, in Montana, together with all rights to the use of water, or irrigating said premises, and for domestic use thereon, to which said mortgagors or the said premises hereby conveyed are now or may hereafter become entitled, together with all shares of stock or shares of water in any ditch or irrigation company which in any manner entitled said mortgagors to water for irrigation or domestic purposes upon said lands.

Together with all and singular the tenements, hereditaments, and tenements, thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the premises above mentioned and described, and hereby conveyed or intended to be, with the appurtenances, unto the said party of the second part its successors and assigns forever.

In witness whereof, the said party of the first part to these presents, Sheriff, as aforesaid hath hereunto set his hand and his seal the day and year first above written.

HENRY GRIERSON, (Seal)

Sheriff of the said County of Rosebud, State of Mont.

Witness of Signature: M. HUNTER.

(\$1.00 I. R. Stamps attached and cancelled.)

State of Montana,

County of Rosebud,—ss.

On this 3d day of May, 1918, before me, T. W. Carolan, a notary public in and for the said county

of Rosebud, personally appeared Henry Grierson, Sheriff of the said county of Rosebud, State of Montana, personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he, as such sheriff aforesaid, executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[Seal]

T. W. CAROLAN,

Notary Public for the State of Montana, Residing at
Forsyth.

My commission expires on the 11th day of May,
1919. [74]

Filed May 24, 1918, 9 A. M. Fee \$2.50.

W. E. CLARKE,

Clerk and Recorder.

From Book 17 of Deeds, page 508, of the Records
of Rosebud County, Montana.

[Indorsed]:

Office of the County Clerk and Recorder,
Rosebud County, Montana,
State of Montana,
County of Rosebud,—ss.

I do hereby certify that the annexed is a correct transcript of the original remaining on file or record in my office, together with the endorsements thereon contained.

(Testimony of Dr. W. F. Guy.)

Witness my hand and official,

[Seal]

WARREN BUTTERFIELD,

County Clerk and Recorder.

H. O. Callaghan,

Deputy.

December 17, 1920.

Cross-examination.

(By Mr. GRIMSTAD.)

I say there was a first mortgage of 10,000.00 against the land. I believe it was foreclosed, as a matter of fact, I know it was foreclosed. I was made a party to the foreclosure of the first mortgage and served with summons. I did not redeem from the sale. I think the foreclosure of the first mortgage was made at the time that the second mortgage was foreclosed. I was lead to believe that the Montana National Bank bid in the land. The \$8,221.36 note included the notes that were taken over by The Bank of Montana from the First National Bank of Forsyth, amounting to about \$4500.00, including interest, signed by T. I. Van Atta and Guy and Van Atta. That \$8,221.36 practically constituted what Van Atta or Guy and Van Atta owed to the Bank at the time; that is, the indebtedness the Bank of Montana held at that time. On that date I gave the Bank of Montana a collateral pledge, pledging the Morley notes, that is, I gave them a note which I believed was a collateral pledge agreement. Exhibit 26 contains my signature and is the paper that was given to the Bank of Montana on the 27th day of July, 1915. [75]

Exhibit 26 is offered in evidence, read to the jury, and is as follows:

Defendant's Exhibit No. 26.

THE BANK OF MONTANA.

I have transferred and delivered to THE BANK OF MONTANA, Billings, Montana, as collateral security for the payment of any and all liabilities of the undersigned to said Bank, due or to become due, or that may hereafter be contracted, the following property, in my right and title, value of which is Eleven Thousand, Five Hundred, thirty-five and no/100 Dollars, viz:

Makers.	Date.	Due.	Amount.
Mike Morley and Louise Morley	June 12, 1914,	Dec. 1, 1914,	600.00
" " " " "	" " "	" " "	300.00
" " " " "	" " "	Oct. 1, 1914,	2035.00
" " " " "	" " "	" " 1915,	2000.00

Cr. Account Pipe for Syphon 12/16/14 \$642.50 applied on interest.

Mike Morley and Louise Morley June 12, 1914 Oct. 1, 1922, 6600.00

And the undersigned hereby gives the said payee and its assigns authority to sell said property, or any part thereof, or any substitutes, and all additions thereto, on the maturity of any or all my liabilities, or at any time thereafter, or before, in the event of the said securities depreciating in value, at any public sale or private sale, without advertising the same, or demanding payment, or giving notice, with the right to said Bank and its assigns, themselves, to be the purchasers; and after deducting all costs and expenses, to apply the residue to the payment of any, either or all liabilities as aforesaid, as said payee, or its President, Cashier, or assigns shall elect, returning to the undersigned and in case the

proceeds of the sale of said property shall not cover the principal, interest, and expenses, the undersigned engages to pay the said deficiency forthwith after such sale, with legal interest.

Billings, Montana, July 27, 1915.

(Signed) W. F. GUY.

At the time I took over these notes from the Bank of Montana there was a suit pending in the District Court of Cascade County against Van Atta and against Guy and Van Atta on the notes that were taken over by me. As per our agreement these suits were to be dismissed and a new suit instituted, leaving me out altogether, and against Van Atta. The judgment was to be applied on the notes for my benefit. That was partially carried out, later the Van Atta notes were turned over to my wife, that is, they were turned over to me and afterwards I turned them over to my wife. The indebtedness of the Bank of Montana of \$8,221.36 for which I pledged the Morley notes were the ones that I received this notice of sale on. As long as we held possession of the ranch, all taxes were paid. After that, I do not know whether they were paid or not. I am not aware of what Mr. Morley did after he received [76] possession of the ranch. I know he did not pay the first mortgage and it was foreclosed, and that the Montana National Bank was the purchaser. I was given to believe that.

**Testimony of Tisdale I. Van Atta in His Own Behalf
(Recalled).**

T. I. VAN ATTA, recalled as a witness in his own behalf, in answer to the questions put to him testified as follows:

Direct Examination.

(By Mr. McCUE.)

No, sir, at no time, I think, did I get any notice or knowledge that the defendant had sold the notes in controversy under the alleged collateral agreement. The first time I learned that was some time last year. You told me, of course, when you came over to see me in Seattle. That was just previous to the commencement of this suit. I think that was the first time that I ever knew or had any knowledge or information that they had sold these notes I claim in this lawsuit.

Q. Is it true in the transaction whereby Guy became the owner of this property in Great Falls that your partnership matters were settled and disposed of between you and Guy?

Mr. GRIMSTAD.—Objected to for the reason that it is not proper examination; gone into time and again.

The COURT.—You may ask. Partners cannot settle partnership business between themselves without bringing in their creditors in the settlement of the equities that their creditors possess. This Bank at that time had equities in this thing and it is admitted. All statements of settlement will avail you

(Testimony of T. I. Van Atta.)

nothing. He may answer; as between men he may answer. Objection is overruled.

A. I suppose they were, as far as I know, yes. Of course, you still understand I still own a half-interest in those notes; supposed to, in the Morley notes, securities but everything outside of that was settled, —our debts.

(Witness excused.) [77]

Mr. GRIMSTAD.—Your Honor, please, I presume we can take it for granted that the only evidence left to be presented on the part of the plaintiff will be the evidence of Mr. Marhoff with reference to the valuation of this property.

The COURT.—He has so stated.

Mr. GRIMSTAD.—And that being the case, the defendant now moves the Court to enter an order of nonsuit in this action.

The COURT.—In the beginning, counsellor, the Court will state you may make a motion for a directed verdict. There is no such thing as nonsuit in the Federal Court. That has long since been disposed of by decision of the Supreme Court.

Mr. GRIMSTAD.—Comes now the defendant, the evidence on the part of the plaintiff having been presented, and moves the Court to direct the jury to bring in a verdict in favor of the defendant and against the plaintiff, and upon the following grounds, to wit:

First.—The complaint does not state facts sufficient to constitute a cause of action.

Second.—That the proof is wholly at variance with the complaint.

Third.—The evidence shows conclusively that the plaintiff and one W. F. Guy were partners, and still are, in so far as the defendant is concerned.

Fourth.—That any verdict in favor of the plaintiff which the jury might return could not be sustained by the evidence here.

Again,—that the evidence shows that the notes in question have been foreclosed and the parties' interest, if any, then wiped out, both as to the plaintiff and as to W. F. Guy.

Again,—There has been no evidence of any collusion or connivance between Guy and the defendant Bank.

Again,—The complaint is predicated against the Montana National Bank, and the transactions in reference to the notes in question are with the Bank of Montana; there being no proof that the Montana National Bank obligated themselves for the [78] torts, if any, of the Bank of Montana.

Again,—The evidence, both on the part of Van Atta and the complaint, shows conclusively that the action as against the Bank was terminated and that the statute of limitations had run against it, the evidence showing that the defendant Van Atta had knowledge of the transactions in August of 1915 and again in August, 1916.

Further than that, the evidence disclosed that the Bank of Montana, or Montana National Bank converted the collateral security by foreclosing it, and by so doing they did not convert the property but

rather, if the plaintiff has any action at all, it is for an accounting against the defendant Bank, claiming that this property was held in trust for the plaintiff, if he had any remedy.

Again,—There is no evidence here whatever as to the value of these notes, whether they are worth anything.

Furthermore, the plaintiff has failed to allege and prove at any point that there was any tender of the amount that he owed, and that he either owes the Bank of Montana or Guy, and he cannot come into court and sue the Bank of Montana for torts of Guy for what Guy might have done, without offering to pay for what he owes.

And, your Honor, please, I think the authorities that we have on this absolutely bear it out.

Mr. McCUE.—Does your Honor care to hear?

The COURT.—I will hear you briefly, but my own conviction is that the motion must be granted, on the ground that you have not chosen the proper remedy. It lies in an accounting between yourself—Guy, and this defendant; and also the bar of the statute seems conclusive here. If there is really a conversion, you have no case anyway.

The COURT.—Which statute of limitations is it?

Mr. GRIMSTAD.—Yes, I desire to amend, if your Honor please, it should be the same subdivision, but 6449 [79] rather than 6447, and it is two years instead of three. I would like to have that amendment made.

The COURT.—The amendment will be made by interlineation.

The COURT.—You may call in the jury.

Gentlemen of the jury, the evidence for the plaintiff being in, counsel for the defense—as you know—has moved for a directed verdict in his behalf, or its behalf, on the theory that there is not sufficient evidence for various reasons to support the case of the plaintiff, to uphold a verdict in the plaintiff's behalf, if any was by you rendered. It therefore becomes merely a question of law for the Court, a question of law for the Court whether that position taken by the attorney for defendant is sound; then if it is, there is nothing for the Court to do but simply to direct a verdict in behalf of the defendant. And so, as you are a part of the court, an equal part with the Judge, you are called in so you may hear the disposition of the case, if you desire.

This case was originally brought in this court in March, 1920, and its original theory was that of conversion of personal property, Morley notes, by the defendant, which the defendant claimed to be the owner of. The complaint was indefinite and it was demurred to; also in the complaint were various allegations of firm property, of partnership property. The Court sustained the demurrer because the complaint was too indefinite to determine what its theory was or just what the facts were. And in its decision it was careful to point out that if this was firm property and partnership property, involving a partnership, the only remedy of plaintiff was a suit in equity, or an accounting in which the partners and also the creditor holding the Morley notes would be made parties so there might be an accounting and taking note of all claims cross and otherwise, to settle

all of the equities and various claims in one suit. Partnership affairs are always settled in equity, as being more suitable to the nature [80] of partnerships and accounting and more easy because it is easier to handle accounts before the Court, the Court being privileged to take them and study over them after the case is concluded, than to submit them to the jury.

Thereupon the plaintiff in this action brought an amended complaint, a straight suit for conversion, in which the question of partnership and firm property was not referred to at all but he was claimed to be simply a half owner in the Morley notes and that they had been converted by Guy and this defendant in collusion in order to deprive the plaintiff of his interest therein.

From that and from the brief filed on yesterday in support of the plaintiff's resistance to a motion to direct a verdict on the pleadings, the Court was well satisfied that this complaint was drawn with some idea of strategy. I have sat in court for a long time, but I have never known any strategy in court but a fair, open plain statement of the facts as they exist, and to come into court and present them and the law applicable to them, in a logical and consistent manner; because if we are set afloat on the troublous sea of litigation upon the vessel of strategy we are liable, before the end, to be submarined and torpedoed by the facts and sunk to the bottom.

The defendant denied the conversion and set up considerable relating to the transaction with the Bank of Montana, and denied it had any part in the

conversion. Curiously enough, there are none of the pleadings that refer to the Bank of Montana to show that it is connected with this suit or with the defendant, but it seems, it is now plain, the defendant is now the successor of the Bank of Montana. We will pass that over.

But when the evidence comes into court we find this situation: This plaintiff and one Guy were partners in the operation of a ranch and they incurred debts—partnership debts—to the Forsyth Bank and to the Bank of Montana at Billings. They had sold their ranch finally, on which they were operating, [81] and took on it a second mortgage to secure what was due them apparently upon it. They gave their notes to the Forsyth Bank apparently for debts that they owed it, and they pledged the Morley notes, that were their partnership notes, to secure their own notes to the Forsyth Bank. At this time the plaintiff was also personally indebted to the Billings Bank, rather than the partnership being indebted to it. In due time the Bank of Forsyth foreclosed on the note of Guy and plaintiff and sells his collateral, the Morley notes, which were to secure the notes of Guy and the plaintiff.

Now, it is wholly immaterial whether it was a sale or whether it was an assignment, because the Billings Bank got those notes and succeeded either to a complete title or to all the rights of the Forsyth Bank; it is immaterial for the purpose of this motion; so, upon the evidence as it stands here now the Bank of Billings purchased the notes at the foreclosure sale of the Forsyth Bank. At that time

the Bank of Billings had the Morley notes and had the notes of Van Atta and Guy and the plaintiff Van Atta's individual notes. They had brought some suit, apparently up in this county. It seems the partners had some property here, property they had taken in the sale of their own ranch, and partnership property, real estate, bought with partnership funds. At this time Guy goes down to the Billings Bank and makes an arrangement with it. He gives his individual note for all of the Morley notes and for the partnership note of Guy and plaintiff to the Billings Bank and also for plaintiff's personal notes to the Bank; in other words, by his note the parties treated it as a purchase by Guy and a payment by Guy of both the partnership indebtedness and plaintiff's personal indebtedness to the Billings Bank, and Guy gets the Morley notes. Thereupon he turns them back to the Billings Bank as a pledge to secure his own eight thousand dollar note to the Billings Bank, which he gave in payment of the partnership debt and personal debt of the plaintiff in this action. When Guy paid the partnership debt and the personal debt of the plaintiff, as a matter of law [82] he was subrogated to the rights of the Billings Bank and the Forsyth Bank, too.

At any rate, Guy was in this double position: He had the notes impressed with the partnership's rights and in which he had a personal equity, and he had them also impressed with his personal right, by virtue of having paid the plaintiff's personal debt.

Now, when he turned these notes back to the Billings Bank, the Morley notes, he turned back his equities. In other words, the Billings Bank succeeded to the rights that he had in the Morley notes: The right to hold them until the partnership was settled and the partnership debts were paid, and the right to any surplus there might be in those notes, in behalf of Guy. Guy, remember, had paid some eight thousand dollars, for which the plaintiff was obligated for the greater part—six thousand were partnership debts and two thousand the plaintiff's personal debt. So, whatever he had in the partnership notes he transferred to this defendant bank; we will say it is his successor. So this defendant, then, had an interest in the partnership, that is to say, an equity in the property, upon which it had a right to rely for the payment of its claim against Guy, in so far as that equity would work out into money for the benefit of Guy when the partnership affairs were settled.

Now, that partnership has never been settled, because partners cannot go out together and settle their debts without taking into account all partnership property wherever situate and all those who have claims and equities in that property, as the defendant bank had. As a matter of fact, there has never been any settlement of the partnership. Because a witness on the stand says it is settled, when the facts show otherwise, means nothing, or means nothing in the face of facts and [83] principals involved. The original notes have never been paid; the notes of the plaintiff which Guy's wife still

holds have never been paid. Whatever the nature of the settlement between Guy and defendant is, this defendant had a right to be made a party here so its equities could be worked out, which has not been done. All of that can be done in a court of equity for an accounting, for settlement of partnership claims, not only between themselves, but between themselves and this defendant, that has an equity in some of the partnership property. And it follows in a court of law before a jury that the plaintiff cannot maintain such a suit.

In respect to this partnership property, it is true that one partner cannot sell the other partner's interest in partnership property, or dispose of it, but he can dispose of his own interest in the property; and no one will ever know what his own interest is until the partnership has been settled and the debts all paid, and then the two partners have their respective interests in the surplus; and that is the situation here.

Furthermore, if one partner does assume, as here, to pledge partnership property for his partnership debts as well as personal debts, or for personal debts, the rule is just the same; one partner cannot sue to recover that back alone; this plaintiff couldn't sue alone to recover it back, even if the debts were all paid; it takes joint owners to sue for recovery of joint property.

So the motion of the defendant will be granted, and the Clerk will enter up a verdict in behalf of the defendant; if plaintiff has any rights in this property he can still work it out in a suit in a court

of equity in an accounting between the parties, the defendant and any creditors there may be.

Mr. McCUE.—We respectfully take an exception.

The COURT.—The exception will be noted.

The COURT.—Thirty days will be allowed for bill of exceptions. [84]

Dated this 4th day of January, A. D. 1921.

T. F. McCUE.

Attorney for Plaintiff.

NOTICE.

To the Above-named Defendant, The Montana National Bank and Its Attorneys, Grimstad & Brown and J. W. Speer:

You and each of you will please take notice:

Herewith is served upon you the plaintiff's proposed bill of exceptions in the foregoing case, and the same will be presented to the District Judge of said court for settlement and allowance in accordance with the rules of said court.

Dated this 4th day of January, A. D. 1921.

T. F. McCUE,

Attorney for Plaintiff.

Service of the foregoing bill of exceptions is hereby admitted and copy received this 4th day of January, 1921.

GRIMSTAD & BROWN and
J. W. SPEER,

Attorneys for Defendant.

Stipulation Re Bill of Exceptions.

It is hereby stipulated by and between the parties to the foregoing action, thru their respective

counsel of record, that the foregoing bill of exceptions of the plaintiff herein clearly sets forth the testimony proceedings had upon the trial of said cause necessary for the purpose of presenting said cause to the Circuit Court of Appeals upon the writ of error, and that the same may be signed, settled, allowed and filed as and for the bill of exceptions of the plaintiff herein.

Dated this 4th day of January, 1921.

T. F. McCUE,

Attorney for Plaintiff.

GRIMSTAD & BROWN and

J. W. SPEER,

Attorneys for Defendant. [85]

Certificate of Judge to Bill of Exceptions.

Inasmuch as none of the aforesaid matters appear in the record of this court, the Honorable George M. Bourquin, Judge of said court, and who presided on the trial of said cause, having examined this bill of exceptions and found the same, after corrections by him made, conformable to the truth, has hereunto caused the same to be settled, allowed, certified, as and for the bill of exceptions of the plaintiff herein, and as containing all of the evidence proceedings herein necessary to enable the Circuit Court of Appeals to consider said cause of action upon writ of error, and the same is hereby ordered to be filed in said cause as such bill of exceptions and made a part of the record therein.

Dated this 22d day of January, A. D. 1921.

BOURQUIN,
Judge.

Filed Jan. 22, 1921. C. R. Garlow, Clerk. [86]

Thereafter, on Feb. 19, 1921, petition for writ of error was filed herein as follows, to wit:

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Petition for Writ of Error.

Now comes the plaintiff herein, Tisdale I. Van Atta, and says: That on or about the 29th day of December, 1920, this Court made, gave and entered judgment herein in favor of the defendant and against the plaintiff, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more fully and in detail appear from the assignments of error, which is filed with this petition.

WHEREFORE, plaintiff prays that a writ of error may issue in his behalf to the United States Circuit Court of Appeals for the Ninth Judicial District for the correction of errors so complained

of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Court of Appeals.

Dated this 19th day of February, A. D. 1921.

T. F. McCUE,
Attorney for Plaintiff.

Service of the foregoing petition for writ of error is hereby admitted and copy of the same received, this 19th day of February, A. D. 1921.

GRIMSTAD & BROWN,
J. W. SPEER,
Attorneys for Defendant.

Filed Feb. 19, 1921. C. R. Garlow, Clerk. [87]

Thereafter, on Feb. 19, 1921, assignment of errors was duly filed herein, as follows, to wit:

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Assignments of Error.

The plaintiff in the above-entitled action says that there is manifest error in the record herein, and under section 6784, R. C. Montana, as amended by the Session Laws of 1915, which reads as follows:

“Every ruling, order, and decision of any kind or nature, and every verdict, finding, decree or judgment, is to be deemed accepted and it shall not be necessary to ask for or note an exception, and no bill of exceptions need be settled or filed except where and when hereafter expressly required by law or by a rule of the Supreme Court.”

And assigns the following as such:

I.

The Court erred in overruling the plaintiff's objection to the question asked upon cross-examination of plaintiff as follows:

“Yes, in your letter of August 27, 1916, you say, ‘As I understand the matter, however, it is all eliminated by Guy giving you his note for the whole thing.’ You knew, then, a considerable time before you saw Mr. McCue in Seattle, or in Washington some place, that your interests in these notes had been foreclosed or sold out under the collateral pledge agreement, did you not?”

The COURT.—Sold out under what agreement?

Q. Under the agreement, pledge agreement, with Dr. Guy and also the pledge agreement with the First National Bank of Forsyth. [88]

Mr. McCUE.—At this time we object to this line of evidence as being incompetent, immaterial, and there is no proper evidence going to show that any foreclosure was ever made as outlined in the evidence thus far, and is calling

for conclusion, opinion, of the witness on a matter that is not within the issues of this case, and also that the inquiry is not proper cross-examination.

The COURT.—He testified he did not know until he met counsel of plaintiff, and his ownership, that is one of the main issues in the case. The question is proper cross-examination. He may answer. Overruled.

Exception noted and allowed.”

(Bill of Exceptions, page 11.)

II.

The Court erred in overruling plaintiff's objections to the following question:

“Q. This last exhibit reads as follows: ‘The only answer that we can make, as the matter now stands, is that Dr. Guy was indebted to the Bank of Montana for about \$8,000.00 and as security for that, Dr. Guy put up with the Bank of Montana the Morley notes. Dr. Guy failed to pay the note when due, and the collateral was then sold by the bank, so that, as it now stands, the bank is the holder of the Morley notes.’ You knew on that date, or a few days after that, that the Bank of Montana had taken over the Morley notes from Dr. Guy, did you not?

Mr. McCUE.—Objected to as argumentative and incompetent and intended to place a construction upon a plain letter.

The COURT.—He can answer if he can; objection overruled. I think he will make more

progress if he can rely on the language of the letter.

Exception noted and allowed."

(Bill of Exceptions, page 12.) [89]

III.

The Court erred in admitting the following evidence, over plaintiff's objection:

"Q. Did you redeem under the sale of the first mortgage?

Mr. McCUE.—Objected to—incompetent, immaterial and irrelevant; furthermore, there was no obligation in view of the records in this case, the plaintiff's notes having been converted, no obligation for him to redeem.

The COURT.—He may answer.

Exception noted and allowed.

A. No.

Q. You never made any effort to, did you?

Mr. McCUE.—Same objection as above.

The COURT.—Like ruling.

Exception noted and allowed.

A. No, sir.

Q. Did you ever inquire as to what amount it would take to redeem?

Mr. McCUE.—Same objection as last above.

The COURT.—I doubt whether the details are material; he may answer.

Mr. McCUE.—Note an exception."

(Bill of Exceptions, page 18.)

IV.

The Court erred in sustaining the defendant's objections as follows:

A. I understood as stated; I understood that the Bank of Montana had taken over those papers or securities from the First National Bank of Forsyth. Inasmuch as they had—may I say this, your Honor?

The COURT.—Proceed.

A. (Contd.) Inasmuch as they had agreed to protect me and take [90] care of my interests—

Mr. GRIMSTAD.—To which we object when the agreement between him and the bank protecting his interests is not in question, nothing in writing shown, and nothing here to indicate that the plaintiff is suing for an accountable wrong of any rights he may have had.

The COURT.—Objection will be sustained.

The Great Falls property was settled between Dr. Guy and myself.

A. Have you got any accounts pending now, any partnership that is, accounts with any bank in the name of the firm, or did you have at the time of the commencement of this action?

Mr. GRIMSTAD.—Objected to as incompetent, irrelevant and immaterial, nor proper re-direct examination.

The COURT.—Sustained.

Exception noted and allowed.”

(Bill of Exceptions, page 19.)

V.

The Court erred in sustaining the defendant's objection to the introduction of the following evidence:

“Q. Tell the jury what was said between yourself and Mr. Langworthy.

Mr. GRIMSTAD.—That is objected to—incompetent, irrelevant and immaterial.

The COURT.—What is the object of this?

Mr. McCUE.—The object, if your Honor please, is that in the pleadings, and, in a way, in cross-examination, it was claimed by the defendant in this case that there was a sale, a foreclosure in that transaction, and our contention being that the Bank of Montana merely succeeded to the interests of the First National Bank of Forsyth, that it did not in fact constitute a foreclosure or an extinction of the title to the collateral security in the plaintiff.
[91]

The COURT.—The objection will be sustained.

Exception noted and allowed.

Q. What was done when you got down to the First National Bank of Forsyth by yourself and Mr. Brown, a member of the firm of Grimstad & Brown, representing the Montana National Bank—Bank of Montana, and the officers of the bank, and the First National Bank of Forsyth?

Mr. GRIMSTAD.—Objected to as immaterial.

The COURT.—The objection will be sustained. If ever anything of this sort will be material, it is not now.

Exception noted and allowed.

A. After my return from Forsyth I went over to the Bank of Montana by prearrangement.

Q. What was done there, if anything, with reference to the notes involved in this lawsuit?

Mr. GRIMSTAD.—That is objected to, incompetent, irrelevant and immaterial.

The COURT.—What is the object of this?

Mr. McCUE.—I want to show the actual transaction that took place, along the line that we contend for in the lawsuit, that the taking over of the notes by this witness and the repledging of them was a transaction without any sale and still preserved the title in the plaintiff to the notes in question.

The COURT.—I find nothing in your complaint. You start off with the fact that these two men owned these notes and that this plaintiff pledged them for his debt.

Mr. McCUE.—That is true; we take it this is a part of the evidence?

The COURT.—Proceed; objection sustained to the last question.

Exception noted and allowed.”

(Bill of Exceptions, page 20, 21, 22.) [92]

VI.

The Court erred in sustaining the defendant's motion for a directed verdict.

(Bill of Exceptions, page 44.)

VII.

The Court erred in entering judgment against the plaintiff herein.

VIII.

The Court erred in overruling plaintiff's petition for a new trial herein.

Dated this 19th day of February, A. D. 1921.

T. F. McCUE,

Attorney for Plaintiff.

Service of the foregoing assignments of error is hereby admitted this 19th day of February, 1921, and copy of the same received.

GRIMSTAD & BROWN,

J. W. SPEER,

Attorneys for Defendant.

[Indorsed on the back]: #816. Title of Cause. Assignment of Errors. Filed Feb. 19, 1921. C. R. Garlow, Clerk. [93]

Thereafter, on Feb. 19, 1921, order allowing writ of error was entered herein as follows, to wit:

In the District Court of the United States for the District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

**Order Allowing Writ of Error, Supersedeas and
Fixing Bond.**

On this 19th day of February, 1921, came the plaintiff above named by his attorney and filed and

presented to this Court his petition praying for the allowance of a writ of error and supersedeas herein, and filed and presented to this court assignments of error intended to be urged by him; praying also that a transcript of the record and the proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such order and further proceedings may be had as may be proper in the premises.

IN WITNESS WHEREOF the Court does allow the writ of error prayed for.

IT IS FURTHER ORDERED that the amount of the security herein shall be fixed at the sum of Three Hundred Dollars (\$300.00); that upon the making and filing with the clerk of this court a good and sufficient undertaking in said sum by said plaintiff, all further proceedings herein be superseded and stayed until the final determination of said appeal by the said Circuit Court of Appeals, and until further order of this Court.

IT IS FURTHER ORDERED that a transcript record of all proceedings had in said cause be submitted to the clerk of the United States Circuit Court of Appeals for the Ninth Judicial District.

Dated this 19th day of February, A. D. 1921.

BOURQUIN,

Judge.

Filed Feb. 19, 1921. C. R. Garlow, Clerk. [94]

Thereafter, on Feb. 19, 1921, praecipe for transcript was filed herein as follows, to wit:

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Praecipe for Transcript of Record.

To Honorable C. R. GARLOW, Clerk of the
Above-entitled Court:

You will please prepare transcript of the record of this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under appeal heretofore presented to said court, and include in said transcript the following pleadings and papers now on file in your office, to wit: Amended complaint, the answer to amended complaint, replication to the answer, judgment, petition for new trial, order overruling petition for new trial, bill of exceptions, petition for writ of error, assignment or errors, order allowing writ of error, writ of error and citation.

T. F. McCUE,

Attorney for Plaintiff in Error.

[Endorsed on the back]: No. 816. Title of Cause. Praecipe for Printing Transcript. Filed Feb. 19th, 1921. C. R. Garlow, Clerk. By H. H. Walker, Deputy Clk. [95]

Thereafter, on Feb. 23, 1921, bond on writ of error was filed herein as follows, to wit:

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Bond on Writ of Error.

WHEREAS, the above-named plaintiff has sued out of this court a writ of error to the Circuit Court of Appeals of the Ninth Circuit, from the judgment and order of this Court rendered herein; and,

WHEREAS, this Court has fixed the amount of the bond to be given on the part of the plaintiff pursuant to the suing out of said writ of error, and has fixed the same in the penal sum of Five Hundred (\$500.00) Dollars,—

Now, therefore, we, the undersigned, Tisdale I. Van Atta, as principal, and the United States Fidelity & Guaranty Company, a corporation, of Baltimore, Maryland, as surety, do hereby undertake and agree to and with the defendant, the Montana National Bank, that the plaintiff will pay to the defendant all costs and damages that may be awarded in its favor and against the plaintiff by reason of the suing out and the issuance of the

writ of error aforesaid, whether the same be by reason of an affirmance in whole or in part of the judgment of this Court rendered in said judgment, not exceeding, however, the sum of Five Hundred (\$500.00) Dollars, and for the payment of said sum we bind ourselves, our heirs and assigns, and agree that the same shall be paid well and truly, in lawful money of the United States.

Dated this 21st day of February, A. D. 1921.

TISDALE I. VAN ATTA.

By T. F. McCUE,

His Attorney.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

[Seal]

By B. P. McNAIR,

Attorney in Fact.

[Indorsed on the back]: #816. Title of Cause.
Undertaking on Writ of Error. Filed Feb. 23.
1921. C. R. Garlow, Clerk. [96]

—i—

On February 19, 1921, citation was issued herein, which original citation is hereunto annexed and is in the words and figures following, to wit: [97]

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Citation on Writ of Error.

The United States of America to The Montana National Bank, a Banking Corporation, of Billings, Montana, Defendant, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, California, thirty (30) days from and after the date of this citation, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States, for the District of Montana, wherein the plaintiff above named is plaintiff in error, and you, the defendant above named, are defendant in error, to show cause, if any there be, why the said judgment made, given, rendered and filed against plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Dated this 19th day of February, 1921.

BOURQUIN,
Judge.

Service of the foregoing citation of writ of error is hereby admitted and copy of the same received this 19th day of February, 1921.

GRIMSTAD & BROWN,
J. W. SPEER,
Attorneys for Defendant. [98]

[Endorsed]: #816. Tisdale I. Van Atta vs. Montana Nat. Bank. Citation. Filed Feb. 19, 1921. C. R. Garlow, Clerk. [99]

On February 19, 1921, a writ of error was duly issued herein, which original writ of error is hereunto annexed and is in the words and figures following, to wit: [100]

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America, the
Judge of the District Court of the United
States, for the District of Montana, GEORGE
M. BOURQUIN, GREETING:

Because of the record and proceedings and also the rendition of the judgment of a plea which is in said District Court before you, between Tisdale I. Van Atta, plaintiff, and The Montana National Bank, a banking corporation of Billings, Montana, defendant, a manifest error hath happened to the great damage of the said Tisdale I. Van Atta, as is seen and appears by the complaint. We being willing that such error, if any hath been, should be *duly and just* and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal,

distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of the said court in the Federal Building in the city of San Francisco, California, together with this writ, so that you have the same at said place, before the Justices aforesaid, on the 21st day of March, 1921; that the record and proceedings aforesaid being inspected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the law and custom of the United States ought to be done. [101]

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 19th day of February, in the year of our Lord one thousand nine hundred and twenty-one.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court.

[Seal] C. R. GARLOW,
Clerk of the District Court of the United States of
America, for the District of Montana.

Granted and allowed by:

BOURQUIN,
Judge.

Service of the foregoing writ of error is hereby admitted and copy of the same received this 19th day of February, 1921.

GRIMSTAD & BROWN,
J. W. SPEER,
Attorneys for Defendant.

Answer of Court to Writ of Error.

The answer of the Honorable, the Judge of the District Court of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made with all things concerning the same, I hereby certify under the seal of said District Court, to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, in a certain schedule to this writ annexed, at the day and place therein contained, as within I am commanded.

By the Court.

[Seal]

C. R. GARLOW,
Clerk. [102]

[Endorsed]: #816. Tisdale I. Van Atta, vs. Montana Nat. Bank. Writ of Error. Filed Feb. 19, 1921. C. R. Garlow, Clerk. [103]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 103 pages, numbered consecutively from 1 to 103, inclusive, is a true and correct transcript of the rec-

ord and proceedings in said cause, and the whole thereof, as appears from the original records and files of said court in my custody as such clerk. And I do further certify that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Forty-six and 85/100 Dollars (\$46.85), and have been paid by the plaintiff in error.

Witness my hand and the seal of said court at Great Falls, Montana, March 16th, 1921.

[Seal]

C. R. GARLOW,
Clerk. [104]

[Endorsed]: No. 3663. United States Circuit Court of Appeals for the Ninth Circuit. Tisdale I. Van Atta, Plaintiff in Error, vs. The Montana National Bank, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed March 21, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

TISDALE I. VAN ATTA,

Plaintiff in Error,

vs.

THE MONTANA NATIONAL BANK,

a Corporation,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District
Court of the District of Montana.

T. F. McCUE

Attorney for Plaintiff in Error
Great Falls, Montana

FILED

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WYOMING

Case Number 3663

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

TISDALE I. VAN ATTA,

Plaintiff in Error,

vs.

THE MONTANA NATIONAL BANK,
a Corporation,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court, of the District of Montana:

STATEMENT OF FACTS:

This case comes to this Court upon a Writ of Error to the United States District Court of the District of Montana.

The case was tried in the lower Court, to the Court and a jury; at the conclusion of plaintiff's case the learned trial court upon motion of the defendant, directed a verdict for the defendant.

For some time prior to the 12th day of June, A. D., 1914, the plaintiff in error and one W. F. Guy,

were joint owners of Six Hundred Seventy-one (671) acres of farm lands located in Rosebud County, Montana. On this date they sold to one Mike Morley and his wife, the land and received in part payment five (5) promissory notes aggregating Eleven Thousand Five Hundred Thirty-five (\$11,535.00) Dollars. To secure these notes Mike Morley and his wife executed a mortgage upon the land, these notes being particularly described on Page 78 of the Transcript.

At or about this time the plaintiff in error and the said W. F. Guy were indebted to the First National Bank of Forsyth, Montana, in the sum of Four Thousand Five Hundred Thirty-six and 65/100 (\$4,536.65) Dollars; to secure this indebtedness due to such bank, the said W. F. Guy, deposited as collateral security the Morley notes above referred to. At or about this time the plaintiff in error was indebted to the Bank of Montana, of Billings, Montana, on certain promissory notes aggregating Two Thousand One Hundred Fifty (\$2,150.00) Dollars. On the 27th day of July, A. D., 1915, the Bank of Montana, was anxious to get the indebtedness of the plaintiff in error secured and on this date, through an arrangement with the officers of the First National Bank of Forsyth, Montana, and W. F. Guy, the Bank of Montana took over from the bank of Forsyth, the indebtedness represented by promissory notes of the plaintiff in error and said W. F. Guy, to the First National Bank of Forsyth and the Morley notes securing the same, the Bank of Montana, paying to the Forsyth bank the amount of the original indebtedness, and thereafter the

Bank of Montana held these Morley notes to secure the notes it acquired from the First National Bank of Forsyth, together with the notes due it from the plaintiff in error.

On June 1st, A. D., 1916, through some manipulation and negotiations, on the part of the Bank of Montana, of Billings, Montana, through its officers and W. F. Guy, W. F. Guy executed and delivered to that bank his individual promissory note for Eight Thousand Two Hundred Twenty-one and 36/100 (\$8,221.36) Dollars, which note is set out at Page 14 of the Transcript, and is known in the record as Exhibit 20. This note, Exhibit 20, was delivered by W. F. Guy and accepted by the bank as payment of all the obligations due to it, both by plaintiff in error as a joint debtor with W. F. Guy and his individual obligations. Thereupon the Bank of Montana delivered to said W. F. Guy the note which was acquired by it from the First National Bank of Forsyth, also promissory notes due it from the plaintiff in error, which he owed individually. Thereafter, at or about this time as part of the same transaction said W. F. Guy deposited as collateral security all of the Morley notes to secure this Exhibit 20, his individual obligation to the bank. The matter stood this way until the 23rd day of January, A. D., 1917, when the defendant in error without notice to plaintiff in error of any kind, sold under the collateral agreement with W. F. Guy, all of the Morley notes and bid them in at such sale in its own name. The Bank of Montana, having been previously converted into the National Bank of Montana,

and as such succeeded to all rights of the Bank of Montana in the notes in question.

During all the time herein, plaintiff in error owned an undivided one-half interest in said Morley notes. On account of the alleged sale of the Morley notes under the pledged agreement, the defendant in error claimed thereby to own the mortgage executed by Mike Morley and his wife on the land, heretofore delivered to W. F. Guy and plaintiff in error. Thereafter the defendant in error instituted in the District Court of Rosebud County, Montana, an action to foreclose this mortgage. Pursuant to this foreclosure, on the 8th day of May, A. D., 1918, it secured Sheriff's Deed to the land securing the Morley notes, which Sheriff's Deed is Exhibit 25 in the Record and shown at Pages 90 to 95 inclusive, on the Transcript. Thereafter the defendant in error, and all times since the Sheriff's Deed claimed to be the absolute, unqualified owner of the land.

That at the time the land in question was sold by W. F. Guy and plaintiff in error to said Morley there was a first mortgage upon it for Ten Thousand (\$10,000.00) Dollars, the land being particularly described in Exhibit C at Page 25 of the Transcript. This land during the time mentioned herein, particularly 1917 to 1920, is worth in the market One Hundred (\$100.00) Dollars per acre or about Sixty-seven Thousand (\$67,000.00) Dollars, so that the defendant in error through the manipulation with W. F. Guy, acquired this land at an actual outlay of between Nineteen Thousand (\$19,000.00) Dollars and Twenty Thousand

(\$20,000.00) Dollars, including interest, costs and attorney's fees.

At no time did the plaintiff in error have any notice or knowledge of the pretended sale of the Morley notes made by the defendant in error on the 23rd day of January, A. D., 1917, until the latter part of March, A. D., 1920, then he was advised for the first time of this transaction. Thereupon he caused demand to be made upon the defendant in error for his one-half interest in these Morley notes. This demand is shown by Exhibit No. 2 (Trans. P. 42.) His demand was immediately denied as shown by Exhibit No. 1, (Trans. P. 44).

The only partnership that ever existed between the plaintiff in error and W. F. Guy, was the land in Rosebud County, Montana, securing the Morley notes. All of these partnership matters were fully settled before the commencement of this suit.

(Van Atta's Testimony, Trans. 69-70.)

"The property was owned by Mr. Van Atta and myself. The obligations and debts of Guy and Van Atta have all been settled. I think they were all settled prior to 1917. We had a settlement settling up all our partnership relations in regard to all debts, and things pertaining to the partnership. We had a settlement prior to 1917, I think. It might also have been the fore part of 1917. The Great Falls property was the last piece of property that our partnership owned. Van Atta sold his interest in that property to my wife. That was about 1917, and that wound up everything in connection with the partnership. The T. I. Van Atta notes that I got from the Bank of Montana, and also the note of \$1,500.00 signed by T. I. Van Atta are still a claim against Mr. Van Atta and they are not paid. All of the rest of

the matters of the partnership business has been cleaned up and adjusted. To my (68) knowledge they were all settled. I was a party to the settlement. There are no outstanding partnership obligations or partnership property between myself and Van Atta unless you consider the Morley notes are not settled. I am not claiming any interest in the Morley notes. My interest in the Morley notes was taken over by the bank. I am making no claim whatever as to any interest in these Morley notes."

(W. F. Guy's Testimony, Trans. 83.)

Thereupon and immediately after the service of this demand and refusal, the plaintiff in error commenced this action in trover against the defendant in error for the conversion of his one-half of the Morley notes hereinbefore set forth.

The material proposition involved, or rather the point upon which the learned trial Court determined this case and directed the verdict, is based upon the contention that this cause of action involves partnership relations and that plaintiff has pursued the wrong remedy; that his remedy was one by a bill in equity for an accounting.

The plaintiff in error claims that the following facts are established by the evidence introduced upon the trial, which are confessed as a variety by a motion for a directed verdict:

(a) That the plaintiff in error was, at all times since their execution and delivery, the owner of one-half of the promissory notes in controversy.

(b) That the defendant's claim of ownership of such notes is based upon a pledge agreement made by one W. F. Guy with the Bank of Montana, to secure his

individual note dated July 27, 1915, for \$8,221.36, being Exhibit 20 in this record, (Trans. 79.)

(c) That the Bank of Montana, prior to January 16, 1917, was converted from a State Bank to a National Bank under the name of the Montana National Bank, the defendant herein (Paragraph 7, Exhibit 12, Trans. P. 64.)

(d) That the partnership of Guy and Van Atta was dissolved and fully settled before the commencement of this action and that there are no unpaid or outstanding obligations of this partnership.

(e) That the defendant received and accepted Exhibit 20, in full payment of all of the partnership liabilities to it and also the plaintiff's individual indebtedness (Defendant's Answer, Paragraph 6, Trans. Pp. 13-14-15.)

(f) That the defendant is not the owner or holder of any claim, either of an equitable or a legal nature—against the former partnership of Guy and Van Atta, nor against the plaintiff individually.

From the foregoing admitted facts which stand as a variety in the record, under the motion for a directed verdict the plaintiff claims the following propositions of law obtain—and must be applied to this case:

(1) That the proof and the admissions in the Answer of the defendant constitute conversion of plaintiff's interest in the notes in controversy.

(2) That this conversion took place on April 1, 1920, when defendant denied plaintiff's right and interest in the notes; that plaintiff's cause of action did

not accrue until after April 1, 1920. Exhibits 1-2, (Trans. Pp. 42-44.)

(3) That an action for an accounting of the partnership in a court of equity against the defendant and the co-partnership could not be maintained in a court of equity for the reason that there were no partnership obligations involved, and the plaintiff's remedy is plain, speedy and adequate at law, being the suit for conversion as brought and prosecuted in this case.

(4) That upon the record in this case the value of the notes converted is their face and interest as provided therein; that the value of the same not being denied by the defendant's evidence, upon conversion, the presumption of law is that the value of promissory notes is that of their face or what they call for.

ASSIGNMENT OF ERROR.

The plaintiff in the above entitled action submits that there is manifest error in the record herein, and assigns the following as such:

I.

The court erred in overruling the plaintiff's objection to the question asked upon cross examination of plaintiff as follows:

Yes, in your letter of August 27, 1916, you say, "as I understand the matter, however, it is all eliminated Guy giving you his note for the whole thing." You knew that a considerable time before you saw Mr. McCue in Seattle, or in Washington some place, that your

interests in these notes had been forced or sold out under the collateral pledge agreement, did you not?

The Court: Sold out under what agreement?

Q. Under the agreement, pledge agreement, with Dr. Guy and also the pledge agreement with the First National Bank of Forsyth.

Mr. McCue: At this time we object to this line of evidence as being incompetent, immaterial, and there is no proper evidence going to show that any foreclosure was ever made as outlined in the evidence thus far, and is calling for conclusion, opinion, of the witness on a matter that is not within the issues of this case, and also that the inquiry is not proper cross examination.

The Court: He testified he did not know until he met counsel of plaintiff, and his ownership, that is one of the main issues in the case. The question is proper cross examination. He may answer. Overruled.

Exception noted and allowed (Trans. P. 56.)

II.

The Court erred in overruling plaintiff's objection to the following question:

Q. "This last Exhibit reads as follows: 'The only answer that we can make as the matter now stands, is that Dr. Guy was indebted to the Bank of Montana for about \$8,000.00 and as security for that Dr. Guy put up with the Bank of Montana the Morley notes. Dr. Guy failed to pay the note when due and the collateral was then sold by the bank, so that, as it now stands, the bank is the holder of the Morley notes.'" You knew on that date, or a few days after that, that

the Bank of Montana had taken over the Morley notes from Dr. Guy, did you not?

Mr. McCue: Objected to as argumentative and incompetent and intended to place a construction upon a plain letter.

The Court: He can answer if he can; objection overruled. I think he will make more progress if he can rely on the language of the letter.

Exception noted and allowed (Trans. P. 57.)

III.

The Court erred in admitting the following evidence, over the plaintiff's objection:

Q. Did you redeem under the sale of the first mortgage?

Mr. McCue: Objected to, incompetent, immaterial, and irrelevant, furthermore, there was no obligation in view of the records in this case, the plaintiff's notes having been converted, no obligation for him to redeem.

The Court: He may answer.

Exception noted and allowed.

A. No.

Q. You never made any effort to, did you?

Mr. McCue: Same objection as above.

The Court: Like ruling.

Exception noted and allowed.

A. No sir.

Q. Did you ever inquire as to what amount it would take to redeem?

Mr. McCue: Same objection as last above.

The Court: I doubt whether the details are material. He may answer.

Mr. McCue: Note an excepetion (Trans. Pp. 67-68.)

IV.

The Court erred in sustaining the defendant's objections as follows:

A. I understood as stated; I understood that the Bank of Montana had taken over those papers or securities from the First National Bank of Forsyth. Inasmuch as they had—May I ask this, your Honor?

The Court: Proceed.

A. (Cont'd) Inasmuch as they had agreed to protect me and take care of my interests—

Mr. Grimstad: To which we object when the agreement between him and the bank protecting his interest is not in question, nothing in writing shown, and nothing here to indicate that the plaintiff is suing for an account—about wrong of any rights he may have had.

The Court: Objection will be sustained.

The Great Falls property was settled between Dr. Guy and myself.

Q. Have you got any accounts pending now, any partnership accounts, that is, with any bank in the name of the firm, or did you have at the time of the commencement of this action?

Mr. Grimstad: Objected to as incompetent, irrelevant and immaterial, nor proper redirected examination.

The Court: Sustained.

Exception noted and allowed. (Trans. 69.)

V.

The Court erred in sustaining the defendant's objection to the introduction of the following evidence:

Q. Tell the jury what was said between yourself and Mr. Langworthy.

Mr. Grimstad: That is objected to, incompetent, irrelevant, and immaterial.

The Court: What is the object of this?

Mr. McCue: The object, if your Honor please, is that in the pleadings, and in a way, in cross examination, it has been claimed by the defendant in this case that there was a sale, a foreclosure in that transaction and our contention being that the Bank of Montana merely succeeded to the interests of the First National Bank of Forsyth that it did not in fact constitute a foreclosure or an extinction of the title to the collateral security in the plaintiff.

The Court: The objection will be sustained.

Exception noted and allowed.

Q. What was done when you got down to the First National Bank of Forsyth, by yourself and Mr. Brown, a member of the firm of Grimstad & Brown, representing the Montana National Bank—Bank of Montana, and the officers of the bank, and the First National Bank of Forsyth?

Mr. Grimstad: Objected to as immaterial.

The Court: The objection will be sustained. If ever anything of this sort will be material, it is not now.

Exception noted and allowed.

A. After my return from Forsyth I went over to the Bank of Montana by pre-arrangement.

Q. What was done there, if anything, with reference to the notes involved in this lawsuit?

Mr. Grimstad: That is objected to, incompetent, irrelevant and immaterial.

The Court: What is the object of this?

Mr. McCue: I want to show the actual transaction that took place, along the line that we contend for in this lawsuit, that the taking over of the notes by this witness, and the re-pledging of them was a transaction without any sale and still preserved the title in the plaintiff to the notes in question.

The Court: I find nothing in your complaint. You start off with the fact that these two men owned these notes and that this plaintiff pledged them for his debt.

Mr. McCue: That is true; we take it this is a part of the evidence?

The Court: Proceed; objection sustained to the last question.

Exception noted and allowed. (Trans. P. 71.)

VI.

The Court erred in sustaining the defendant's motion for a directed verdict.

(Trans. 109.)

VII.

The Court erred in entering judgment against the plaintiff herein.

(Trans. 36-37.)

The foregoing assignments of error are made and

based upon Section 6784 R. C. Montana as amended by Session Laws of 1915, shown on Page 721, Vol. 3, Supplement 1915, and the following record made by the court upon the trial is shown upon Page 26 of the transcript, to-wit:

Mr. McCue: Pardon me. May I ask if it is necessary to take exceptions in this court, or does the Court grant an exception to each adverse ruling?

The Court: We are following the state practice in actions, if you get them in state actions, I presume you get them here.

The Section above referred to reads as follows:

“Every order, ruling and decision of any kind or nature, and every verdict, finding, decree or judgment is to be deemed excepted to, and it shall not be necessary to ask for or note an exception, and no bill of exceptions need be settled or filed except where and when hereafter expressly required by law or by a rule of the Supreme Court.”

ARGUMENT.

Taking up the first assignment of error, we believe that the learned Court erred in sustaining defendant's objection to the question shown under this assignment for the reason that there was nothing asked in chief of the plaintiff about a pledge agreement with the First National Bank of Forsyth, and it was not proper cross-examination. It infused into the record matters of defense which the plaintiff would have a right to offset by rebuttal. The inquiries in chief were made entirely to the sale by the defendant under Guy's pledge agree-

ment, and the alleged sale made on January 23, 1917. We believe that this was clearly error.

Assignment of error two (2) comes under the same head and we think the same is well taken.

We believe also that assignment of error three (3) is well taken.

Taking up assignment of error four (4), it will be seen that the Court permitted the defendant to cross-examine the plaintiff with reference to whether or not the partnership of Guy and Van Atta was in existence and Van Atta inadvertently testified that there were partnership matters. This was not proper cross-examination, nor was it admissible under the state of the record, but in view of the fact that the Court permitted this cross-examination, the same became the law of the case, and we had a right to show the facts and the truth of the matter. On redirect and since the Court allowed the defendant the right to cross-examine into the question of the partnership, it seems to us that we had the absolute right on redirect to ask the questions shown upon Page 71 of the Transcript, as noted under the head of this assignment.

These rules are so well established that we do not believe it is necessary to cite any authority in this Honorable Court to sustain this position.

Discussing assignment of error five (5), the Court permitted the defendant to cross-examine the plaintiff with reference to the transaction with the First National Bank of Forsyth. This was merely matters of defense and could not be brought out upon cross-examination because that transaction was not gone into in

chief, but in view of the fact that the Court permitted such cross-examination, this procedure became the law of the case and we undoubtedly had the right to show that the transaction between the Bank of Montana and the First National Bank of Forsyth consisted merely of the Bank of Montana taking over the indebtedness and the pledge notes and that there was not, in truth and in fact, any sale or attempted sale of the pledged property in that transaction. By the evidence that we sought to introduce under this assignment of error, it would show the transaction as it was, and if we were permitted so to do, we would have shown that the Bank of Montana bought the debt and that the security, the pledged notes, passed as an incident, and that there was no sale or foreclosure in fact made in that transaction. It seems to us that the position of the Court in these respects constitutes error.

We will discuss assignments of error six (6) and seven (7) under the one head; these assignments being so closely allied that a discussion of one, particularly the motion for a directed verdict, will present the matter of the assignment of error on account of the entry of judgment. Where land is the only subject of the partnership, the sale of the property dissolves the relations of the partnership between themselves.

Thompson v. Bowman, 6 Wall, 316 L8 Law Ed. 736.

Gas and Oil Co. v. Thomas, 51 NE. 351.

The Bank of Montana and its successor, the defendant, knew that the land securing the notes in controversy was the only subject of the partnership, their

answer and the evidence shows this conclusively, so that they are bound to know that the sale of the land dissolves the partnership.

If a partner, after dissolution, draws notes in the name of the firm, payable to himself and then endorses them to a third party for a personal and not a partnership consideration, the first endorser cannot maintain an action upon them against the firm, if he knew the notes were antedated.

Smith v. Strader, 4 How. 404, 11 Law Ed. 1031.
In Re: McIntire 132 Fed.

The analogous point of the case at bar to the last law above cited, is that the note (Exhibit 20), for \$8,221.36 was Guy's personal obligation, and it follows as held in Smith v. Strader *supra*, that the bank cannot maintain an action upon this note against the firm of Guy and Van Atta. Not only that, but by the defendant's answer, it is alleged and admitted in Paragraph VI, thereof, that this note was executed, delivered and accepted by the bank in payment of all prior obligations, which obligations are specifically enumerated and described therein. Besides, the bank has stood upon this note and pursued its remedy thereon, all of which is conclusively shown in the evidence, and also that this note constituted payment.

Exhibit Number V, (Trans. 76.)

Shows that this note given by Guy was in full satisfaction of all claims the bank had against the plaintiff in error and against Guy and Van Atta jointly. This exhibit shows that Guy and the bank were colluding together to carry on some deal whereby they could

profit to the detriment of the plaintiff in error; under this exhibit some sort of an action was commenced and the case was agreed to be dismissed against W. F. Guy and the bank was to proceed with the case against Van Atta, bid in the property for the use and benefit of Guy. Evidently the bank was proceeding to give Guy an opportunity to collect the indebtedness due him from the plaintiff in error, out of the attached property, and at the same time the defendant in error was holding the plaintiff in error's half interest in the Morley notes. It is not always easy to uncover a scheme of this kind, but there was sufficient evidence upon the question of collusion between the bank and Guy to go to the jury, and it seems to us that this exhibit is evidence in itself of that fact, and while we cite it as additional evidence of the fact of the payment, we allude to the collusive part to show that both Guy and the bank had some private understanding whereby they were to acquire Van Atta's property.

The effect of payment is to extinguish the obligation and everything accessory thereto to liberate from it all the debts.

Wright v. Mix, 76 Cal. 465, 18 Pac. 646.
Armstrong v. Caesar, 72 Ind. 280.

The giving of the note (Exhibit 20) constituted an accord, (Section 4954 R. C. 1907 Montana.) The acceptance of the note by the bank constituted a satisfaction of the debt (Section 4956 R. C. 1907, Montana.) The bank substituted this note for all the original obligations and that constituted a novation (Section 4958 R. C. 1907, Montana.)

Phillips v. State, 109 Ga. 115.

Richardson v. Gregory, 126 Ill. 166.

Gould v. Banks 8 Wend. 562, (N. Y.)

Ferguson v. Baker, 116 N. Y. 257.

From the foregoing facts and authorities cited, it follows as a legal and a logical conclusion that neither the plaintiff nor the firm of Guy and Van Atta, were in any way indebted to the defendant at the time of the commencement of this action; that being true, the defendant is not entitled to raise the question as to whether the partnership has been settled. Consequently, the learned trial Court had no jurisdiction to determine whether the partnership is settled or unsettled, because under the Answer and the admitted facts, that question is wholly immaterial. A party must show a right in order to have a matter inquired into in a court of justice; the defendant not being a creditor of the firm of Guy and Van Atta, and it having admitted in its Answer that Exhibit 20 was accepted as payment, of all the partnership indebtedness, whether the partnership was dissolved is clearly a mooted question; that plaintiff's rights in this case cannot be adjudicated by the determination of mooted questions is too elementary to require the citation of authority in this court.

It is also admitted or rather pleaded as a fact in the Answer, that Exhibit 20 paid all plaintiff's indebtedness to the defendant, (Answer, Paragraph VI), so that plaintiff not being indebted to the defendant, he was not required to make any tender of payment. Therefore, the question of tender of payment is equally immaterial. A party must owe something before he can be called upon to tender it.

The defendant cannot plead ownership to the exclusion of plaintiff and claim an equitable lien at the same time. Under Section 5725, R. C. 1907, Montana, which reads as follows:

“The sale of any property on which there is a lien, in satisfaction of the claim secured thereby, or in case of personal property, its wrongful conversion by the person holding such lien, extinguishes the lien forever.”

When the defendant sold the notes to satisfy the claim, it, under this Section, lost its lien on the notes.

The above Section of our Code was adopted from the Code of California, and its construction is clearly settled by the case of *Chase v. Putnam*, 117 Calif. 368 49 Pac. 204.

The pretended sale of the notes in controversy made by the defendant on January 23, 1917, was not made pursuant to any pledge agreement with plaintiff, so plaintiff was entitled to insist that the Montana Statutes, Section 5709, which requires actual notice and Section 5793, which provides that the sale must be public auction in the manner specified, and Section 5794, which prohibits the sale of pledged securities such as the notes in question, and Section 5798 which prohibits the pledgee from buying the pledged at his own sale. The Vendor not having complied with any of these statutory requirements, the pretended sale constituted a conversion of the plaintiff's interest in the notes, since it claims individual ownership of these notes to the exclusion of plaintiff's interest.

When Guy pledged the notes under the facts and pleadings, as a matter of law he only pledged his in-

terest, or one-half of them. *Rogers v. Bachelor*; 2 Pet. 221, 9 Law. Ed., 1066.

A joint owner or a partner cannot pledge the joint property to secure his individual obligation. Such a transaction merely pledges such individual interest.

Blair v. Harrison 57 Fed. 257, 6 CCA 326.

Claflin v. Bennett 51 Fed 693.

Rogers & Son v. Bachelor U. S. 9 L. Ed. 1063.

Russell v. Allen, 13 N. Y. 173.

Frans v. Young 24 Ia. 376

“Any sale unauthorized by law or consent of the owner which deprives him of personal property is actionable conversion.” 38 Cyc. 2026.

The defendant, under Guy's pledge agreement, sold the notes and by so doing it could only sell Guy's interest in them. Consequently, when it bid in these notes, it became a co-tenant with plaintiff. This sale in itself did not constitute a conversion of plaintiff's half of these notes. (Paragraph X Answer.)

After the year of redemption expired in September, 1918, it took deed (Exhibit 25) to the land in its own name. These proceedings in themselves, under the well established authority cited, did not constitute conversion of plaintiff's interest in the notes, because all of those proceedings, though they result in extinguishing Guy's interest, they would keep intact the plaintiff's interest. Therefore, no conversion took place until the demand (Exhibit 2, Trans. Page 42) was made on March 27, 1920, and the reply, (Trans. Page 44), which denied any right in plaintiff and the claim of ownership in the defendant. Then, by its answer in the case, defendant claims absolute ownership, which constitutes

such an abuse of a co-tenant's property for which trover will lie against such co-tenant.

Permiter v. Kelly, 18 Ala. 716, 54 Am. Dec. 177.

King v. Neel, 98 Ga. 438; 58 Am. St. Rep. 311.

Wheeler v. Wheeler, 33 Maine, 348.

Cooley v. Torts, (2nd Ed) P. 533.

The Supreme Court of North Dakota in the case of Anderson v. Bank, 5 N. D. 83, by Corless, Judge, says:

“The defendant having assumed to own and control these notes, by reason of an illegal sale and void purchase thereof, converted them to its own use and became liable for their value * * * Its position was on this argument, that it owned them.

The defendant, in the case at bar, has pleaded absolute ownership, which constitutes conversion under the facts. The courts of Massachusetts, New York and Illinois, hold that where one co-tenant claims independent ownership of the joint property, the other tenant may maintain trover.

Weld v. Oliver, 21 Pick., (Mass.) 564.

Delaney v. Root, 99 Mass. 546; 97 Am. Dec. 52.

Needham v. Hill, 127 Mass. 133.

A sale of the joint property which ignores and denies the right of the co-tenant furnishes sufficient proof of conversion.

A co-tenant may make such use of his co-tenant's property that will constitute conversion. The case particularly in point is the case of Clow v. Plummer, (Mich.) 48 N. W., 795. The Michigan court at the last part of the opinion says: “The argument of counsel for the defendant is that it is admitted by the pleadings that the defendant was a tenant in common with the plaintiff; that it is shown by the evidence, that the

property, (the timber converted) was in danger of destruction by fire and other causes; and no sufficient demand having been made, if the plaintiff had a right of action, it was an equitable action for an accounting, and that the defendant should not be charged with wrongdoing. As we have said, we think all the demand necessary, under the circumstances, to have been made, was made. The fact that the timber was liable to destruction by fire was no sufficient reason in law to authorize the defendant to cut, take away and manufacture the common property. One tenant in common has no right over the property of his co-tenant. The defendant had an undoubted right to compel the partition of the common property, but he had no right as co-tenant over the undivided interests.

“The fact that at the time of the commencement of this suit defendant yet had in his possession some of the lumber manufactured from logs taken from this land, and yet undisposed of, would not prevent the plaintiff from bringing and maintaining trover. *Manufacturing Co. v. Barnard*, ante. 280. Under this view of the case the court was not in error in its instructions to the jury upon the question of damages. The judgment must be affirmed, with costs. The other justices concurred.”

Another case in point is the case of *Grisbgy & Day*, (S. D.) 70 N. W. Rep., 81. The Supreme Court of South Dakota in the last part of the opinion, says:

“The next contention of appellant is that there was no conversion of the commission notes and mortgages and that the referee erred in so finding. As will have been observed, all these notes and mortgages

were taken in the name of defendant, but the referee finds that the plaintiff had a one-half interest in them. They were, therefore, tenants in common as to these notes and mortgages, notwithstanding, they were taken in the name of the defendant. The rule seems to be established in this country that if one tenant in common sells or disposes of the chattels his co-tenant may maintain trover against him for their conversion, and recover the value of his interest therein. 4 Am. & Eng., Enc. Law, P. 114. See also cases cited. Judge Cooley in his work on Torts takes the same view and cites a large number of authorities. Cooley, Torts, (2nd Ed) P. 533; Delaney v. Root, 99 Mass. 546; Dyckman v. Valiente, 42 N. Y. 549; Weld v. Oliver, 21 Pick. 599; Lovell v. Insurance Co., 111 U. S. 264, 4 Sup. Ct. 390; Reusens v. Construction Co. 22 Fed. 522; Wilson v. Reed, 3 Johns 174; Tyler v. Tyler, 8 Barb. 585; White v. Brooks, 43 N. H. 402; Bent v. Barnes, (Wis.) 64 N. W. 428; Anderson v. Bank, (N. D.) 64 N. W. 114; Downs v. Finnegan (Minn.) 59 N. W. 981; Moore v. Baker (Ind. App.) 30 N. E. 629.

“The appellant contends that the assignee only acquired the interest of the defendant in these notes and mortgages by the assignment, and that the plaintiff’s remedy is against him, and the plaintiff may assert his right also against the property in the hands of the assignee. We do not deem it necessary to decide either of these questions in this case. Assuming, as contended that plaintiff might have a right of action against the assignee, and might have a remedy as against the property, still the plaintiff retains his remedy as against his co-tenant. The law does not impose upon the plaintiff the duty of proceeding against the assignee or the property. When the defendant transferred these notes and mortgages to the assignee unconditionally, and put them beyond his control, he, in law, converted them, and became liable to the plaintiff for the value of his interest therein in an action against him. We are of the opinion, therefore, that the referee correctly held that the action

for conversion could be maintained against the defendant.”

The evidence conclusively shows all partnership matters of every kind and character existing between the firm of Guy and Van Atta, including all obligations, and debts, were settled prior to 1917.

(Trans. 69-70 Van Atta’s Testimony.)

(Trans. 83 Guy’s Testimony.)

The facts going to show that all partnership matters were fully settled and closed before the commencement of this action are set out in full in statement of facts and it is unnecessary to repeat the same here. Suffice it to say that the evidence shows conclusively that the partnership affairs were fully adjusted and settled and that there are no partnership matters pending; no accounting to make. The only matter that ever belonged to the partnership or had any connection with it is the plaintiff in error’s half-interest in the Morley notes.

Notwithstanding the learned trial Court conclusions for granting the motion for directed verdict, this record is conclusive and undisputed that there are no matters to reach by a bill in equity for an accounting of the partnership affairs. On the contrary the plaintiff’s remedy was plain, speedy, adequate remedy at law, being one for conversion, and bill in equity for accounting would not lie; it would be met at the threshold with objection that plaintiff had a full, complete, speedy, and adequate remedy at law and would be compelled to pursue this law remedy.

The defendant must stand or fall upon its claim

of ownership. It certainly would be an anomaly for defendant, after alleging ownership and title to the property in controversy, to be heard to say because at one time it was partnership property we are denied the right to maintain trover in a court of law, and that we must go into a court of equity and ask for an accounting; that this without a shadow of an equitable defense or an allegation in its answer claiming any of the rights of a partnership, or that it is a creditor of the partnership.

We have heard of the fiction of the law for a good while, but this sort of fiction is too deep for us. It seems to us that it amounts to saying that one who secures property by stealth, when sued for its value could defeat the action on the ground that an accounting is the only remedy.

It must be remembered that we are discussing this feature of the case in the light of the record of this case. The complaint, which alleges ownership in plaintiff; the answer which alleges unqualified ownership in defendant, which is based upon a sale made on account of a pledge not by the partnership, but by Guy individually, to secure his personal obligation, which did not in any manner attempt to bind the partnership. Had the defendant plead equities that only could be determined by an accounting of the partnership affairs, or had they shown that they succeeded to any of the partnership rights, then there might be some excuse for the claim that this action must be brought in a court of equity for an accounting of the partnership.

Upon the face of the pleadings in this case and

upon the evidence introduced, a suit in equity by the plaintiff could not be maintained because it is too elementary to permit of any discussion that where one has a plain, speedy, adequate remedy at law, he must pursue his law remedy and cannot come into a court of equity. Besides, the defendant having by its acts as shown by its Answer foreclosed its right to claim any equities against Van Atta by accepting Guy's individual note as payment of the former's obligations, how can the defendant now claim or insist that it has any right to keep the partnership of Guy and Van Atta alive? Partners have the absolute right to dissolve the partnership by mutual agreement or any other manner they see fit, which is no concern of anyone except creditors of the co-partnership, so the proposition resolves itself into the single question: "was the defendant, at the time of the commencement of this action, a creditor of Guy and Van Atta?" Under the facts in this case which are admitted as a variety on a motion for a directed verdict, the defendant had parted with all of its rights to claim anything against the partnership by accepting Guy's note in payment. The defendant, not being a creditor of the partnership, it is none of its concern whether the partnership is settled. It is estopped on the face of its answer to raise the question. We must remember it is not claiming to be a tenant in common with the plaintiff, but on the contrary it pleads that it is the owner of plaintiff's interest in the notes in controversy. Not only that, but it has especially pleaded that it has foreclosed the mortgage securing these notes and is now the owner of the land; that on account of it

having bid in the land and secured a Sheriff's Deed therefor, it alleges that the notes are worthless (Paragraph X. Answer). There is not a single, solitary principle of equity pleaded in favor of defendant. It claims absolute ownership of the land under the pleading and admitted facts in this case, the defendant is a stranger to the partnership of Guy and Van Atta; it shows no contractual relations; it is not the owner of any equity that it could enforce in any court. Upon the contrary, it relies on a contract of pledge made individually with W. F. Guy while the allegations in Paragraphs VI, VII and VIII of its Answer constitute conversion as a matter of law.

The defendant offered in evidence the original complaint Paragraph VII of which reads as follows:

"That during all of the time mentioned herein the Bank of Montana, Billings, Montana, was a banking corporation duly incorporated and existing under the laws of the State of Montana, and that some time prior to the 16th day of January, 1917, became converted from a State Bank into a National Bank, under the name of the Montana National Bank of Billings, Montana."

The defendant introduced this original complaint. It is properly in the record and is a part of the evidence and a part of the proof which is admitted as a variety under the laws for a directed verdict, which shows and proves that the Bank of Montana and the defendant are one and the same identity.

Upon a motion for a directed verdict for the defendant, all competent and revelant evidence is confessed as a variety.

Moran v. Ebey, 39 Mont. 517, 104 Pac. 522.
Lackman v. Simpson 46 Mont., 523.

STATUTE OF LIMITATIONS.

The Statute of Limitations did not begin until the service of the demand and the refusal (Exhibits 1 and 2) which was made about April 1, 1920. Plaintiff had no notice or knowledge of the sale of the notes in controversy made by the defendant on January 23, 1917, nor the foreclosure proceedings under which the defendant's claim to own the land until just previous to the commencement of this suit, which was also about the time that the demand was served. Plaintiff's cause of action did not accrue until this demand was made and denial of his rights in the property in controversy.

Section 6468 R. C. Montana, 1907, provides as follows:

"Where a right exists but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced, must be computed from the time, when the right to make the demand is complete."

Plaintiff's right to make this demand was not complete until he had notice and knowledge that the defendant denied his having any interest in the property involved.

The question of the statute of limitations of this case is settled beyond dispute by the case of Woods vs. Latta, 35 Montana, commencing on page 9; so that the case has been brought within less than thirty (30) days after the cause of action accrued.

It is true that defendant's exhibit 10 (Trans. P. 55) a copy of a letter purporting to have been written by

Grimstad & Brown which is dated August 31, 1916, claims that the notes in controversy had then been sold under Guy's pledge, but this letter is either a mistake, or written to mislead, because it is false. No sale had at that date been made or attempted to be made under Guy's pledge agreement. The notice of the sale is Exhibit 23 (Trans. p. 84). Guy testified as shown on page 86 of the transcript, that this notice was served upon him at or about the date it bears. This notice is dated the 16th day of January, 1917.

In paragraph VIII of defendant's answer, it is alleged that the sale under Guy's pledge agreement was made on January 23, 1917. So that the evidence and the record in this case is clear and convincing that no sale of the notes had been made as Grimstad & Brown claimed in their letter of August 31, 1916. Nor is there a scintilla of evidence in the record to the effect that the defendant, in fact made any such claim, nor is any sale under the Guy pledge relied upon by defendant, except the one made January 23, 1917.

We declare and claim most respectfully and emphatically that there is not a scintilla of evidence in this record going to show that plaintiff had any knowledge of the sale made January 23, 1917, until some time in March, 1920.

The Statute of limitations must be specially pleaded.

American Mining Co. vs. Basin Mining Co., 39
Mont. 476; 104 Pac. 525.

It is elementary that any fact which must be specially pleaded must be specially proved. Can a false claim

as made in Exhibit 10, constitute such proof as the law requires under a special plea?

Defendant will not be heard to blow hot and cold at the same time. It is in this court upon its plea, and by that plea it must stand or fall. It cannot come into this court and allege that the sale of the notes was made on January 23, 1917, and start the statute of limitations to run by showing that it made a false claim of such sale August 31, 1916.

That the learned trial Court's reasoning as shown on Page 107 of the Transcript is faulty in holding that Guy transferred equities of the partnership to the defendant, seems to us to be very clear. That there were no equities involved in the transaction is self evident. All of the evidence shows that Guy owned an undivided one-half of these Morley notes, and that the plaintiff in error owned the other half. We cannot inject into this case any imaginary equities. Before this transaction took place the Bank held these Morley notes as security for Guy and Van Atta's note and promissory notes of Van Atta which he individually owed. In this transaction those obligations were paid by Guy and he or his wife, whichever it may be, became the owner of them and succeeded to the Bank's interest in the pledged notes and he had a right to hold the pledged property as security for these obligations, but he did not do that. On the contrary he held the original debt against Van Atta as evidenced by these notes and afterwards transferred them to his wife, who, the evidence now shows, to be the owner, then he pledged the Morley notes to secure the new

debt, his individual note, and thereby his lien as pledgee by succession was lost and at that time he owned one-half of these notes, and could only pledge that half interest, which he did. In this transaction, the original debt was separated from the pledged property, and as soon as Guy pledged these notes to secure another debt, the lien as security for the original debt was lost. A pledge gives a possessory lien that can be only held for the debt for which the pledge was given.

Reynes vs. Dumont, 130 U. S. 354, 32 L. Ed. 934.

This case presents a most peculiar question; through the manipulation of Guy and the Defendant in error and its predecessor, it now claims to be the owner of plaintiff's one-half interest in the Morley notes. Mrs. Guy is the holder of his individual notes which the pledge was originally given to secure. Van Atta is liable upon these original obligations. No defense can be made against Mrs. Guy, because, whatever took place between the defendant in error and Guy it constitutes a tort upon the plaintiff in error and this cannot be pleaded either as a counterclaim or offset against Mrs. Guy's Claim. Mrs. Guy cannot be made a party to any partnership accounting. Suppose we follow the law layed down by the learned trial Court and brought suit in equity for accounting and made the defenadnt in error a party. Of course it will be conceded that unless we can make the defendant in error a party, the suit would be a mere useless proceeding. It would plead ownership on account

of the pledge and alleged sale as it has pleaded in this case. If, in that suit it failed to establish its ownership of Van Atta's one-half of these notes, its acts and claim of ownership would constitute a conversion and nothing else, so that the plaintiff in error would be relegated to his remedy at law and the case would be dismissed for the want of equity.

Where the pledgee converts the property pledged, that is, where a former tender of the debt, he refuses to surrender the property or where he makes a wrongful sale of the thing pledged, the pledgor has no remedy in equity because he has an adequate remedy at law by an action of trover or detinue.

LaCombe v. Forestall, 123, U. S. 562.

Flowers v. Stroule, 2 A. K. Marsh (Ky.) 54.

Bryson v. Rayner, 25 Md. 424, 90 Am. Dec. 69.

Upon the face of this record and the evidence which is admitted by the motion for a directed verdict, the defendant in error either owns the notes in controversy or it has converted them. That being true, the remedy we have selected is our only remedy and we are compelled to pursue it.

We respectfully submit the case and believe it should be reversed and new trial granted.

Respectfully submitted,

T. F. McCUE,

Attorney for the Plaintiff.

Great Falls, Montana.

CASE NO. 3663

United States
Circuit Court of Appeals³
For the Ninth Circuit.

TISDALE I. VAN ATTA,

Plaintiff in Error,

vs.

THE MONTANA NATIONAL BANK, a Corpora-
tion,

Defendant in Error.

Brief of Defendant In Error

GRIMSTAD & BROWN

Attorneys for Defendant In Error

Billings, Montana

FILED

MAY 6 - 1921

F. D. MONCKTON;

CLERK

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Statement of Case.

The statement of facts disclosed in the Brief of plaintiff in Error are in many instances wrong and Defendant in Error therefore has deemed it advisable to here state the facts as disclosed by the record.

Prior to 1914 the Plaintiff in Error and one Dr. W. F. Guy operated a ranch in Rosebud County, Montana, under a partnership agreement (Tr. 57). During that year they sold this ranch to a man by the name of Mike Morley and took in payment of the same certain property in Great Falls and also five

notes, dated June 12, 1914, signed by Mike Morley and his wife, in favor of Plaintiff in Error and said Guy, amounting to Eleven Thousand Five Hundred Thirty-five Dollars (\$11,535.00). It further appears that these partners had incurred partnership debts, both to the First National Bank of Forsyth, at Forsyth, Montana, and to the Bank of Montana at Billings, Montana. The notes, amounting to Eleven Thousand Five Hundred Thirty-five Dollars (\$11,535.00), were pledged by the partners to the First National Bank at Forsyth to secure a partnership debt owing to that bank, which amounted to a little more than Four Thousand Dollars (\$4,000.00). At this same time Plaintiff in Error himself personally owed the Bank of Montana two notes aggregating Sixteen Hundred Fifty Dollars (\$1,650.00 and a partnership note in the sum of Fifteen Hundred Dollars (\$1,500.00). Matters ran along in this way for a short time and neither Plaintiff in Error or his partner, Dr. Guy, were able to pay the First National bank of Forsyth, and thereupon the First National Bank of Forsyth sold these notes which had been placed with them under collateral pledge agreement, the purchaser being the Bank of Montana (Tr. 59), the purchaser paying Forty-five Hundred Thirty-six and 35-100 Dollars (\$4,536.35), being the full amount that Plaintiff in Error and said Guy owed the First National Bank of Forsyth at that time, and thereupon the Bank of Montana became the owner of these so-called Morley notes.

Prior to this time the bank of Montana had instituted a naction against both Van Atta and Guy to

recover on the indebtedness they owed the said bank, both as partners and individually, the same amounting, as stated above, to Thirty-one Hundred Fifty Dollars (\$3,150.00). At the time the bank purchased these so-called Morley notes from the First National Bank of Forsyth it made a deal with W. F. Guy, who was a partner of Van Atta, whereby Guy put up his individual note in the sum of Eight Thousand Two Hundred Twenty-one and 61-100 Dollars (8,221.61), and which note was put up in payment of the money that the Bank of Montana had paid to the First National Bank of Forsyth for the Morley notes, and also in payment of the notes that the Bank of Montana held against Van Atta individually and Van Atta and Guy as partners, and also included some costs and expenses the Bank of Montana had been put to. In other words, the Bank of Montana at that time delivered to W. F. Guy the so-called Morley notes and the Guy and Van Atta notes that the partners owed the Bank of Montana, and also the Van Atta note that he owed the Bank of Montana, and at the same time Guy delivered to the Bank of Montana the Morley notes as security for his note of Eight Thousand Two Hundred Twenty-one and 36-100 Dollars (\$8,221.36) that he had given to the bank, and on the same day signed a collateral pledge agreement. It appears further from the record that Guy was unable to pay his note to the Bank of Montana when the same came due and that the bank thereupon, in due course, sold the collateral, the same being the Morley notes, and it became the purchaser.

The pledge agreement under which the First Na-

tional Bank of Forsyth sold the Morley notes, which are the notes in dispute, is found on Pages 58 and 59 of the Transcript, and the collateral pledge agreement, under which the Bank of Montana sold the so-called Morley notes under its agreement with W. F. Guy, is found on Pages 97 and 98 of the Transcript.

The record further discloses that these Morley notes were secured by a mortgage on this ranch in Rosebud County, Montana, upon which there was a prior mortgage of Ten Thousand Dollars (\$10,000.00), and that the first mortgage was subsequently foreclosed and the property bid in by the Defendant in Error and that the second mortgage securing the so-called Morley notes was likewise foreclosed and the property bid in by the Defendant in Error, and that the period of redemption has expired in both instances.

We therefore find from the facts as disclosed by the record that the Bank of Montana obtained title to the so-called Morley notes by purchasing them from the First National Bank of Forsyth under a collateral pledge agreement and that it in turn obtained them the second time under a collateral pledge agreement sale with W. F. Guy. The record, as shown above, discloses that Guy and Van Atta as partners, and Van Atta as an individual, was indebted to the Bank of Montana in approximately the sum of Eight Thousand Dollars (\$8,000.00), and that Plaintiff in Error has never paid any part of that, and he now comes into court and claims that he was the owner of one-half of these Morley notes and

seeks to obtain the value of one-half of them from the Defendant in Error.

Also, Plaintiff in Error attempted to maintain his action upon the theory that the Morley notes were not partnership property; nevertheless, the record is absolutely conclusive that they were partnership property. Plaintiff in Error himself testified, upon cross-examination, that he and Dr. Guy owned this ranch in Rosebud County as partners and that they never settled their partnership differences (Tr. 58). The record shows this statement: "The notes in question (referring to the Morley notes) here were really owned by me and Dr. Guy as partners resulting from the sale of the ranch." The original complaint filed in this case by Plaintiff in Error discloses that he and Dr. Guy owned these notes as partners (Tr. 63).

For a further statement of the facts in this case, we respectfully refer to Judge Bourquin's statement at the time he directed a verdict in favor of Defendant in Error (Tr. 103-4-5-6-7-8).

Counsel for Plaintiff in Error attempted to show there was a settlement of the partnership affairs between Guy and Van Atta but this was contrary to the facts as disclosed, and further, it was directly opposed to the positive statement of the Plaintiff in Error himself.

Argument and Authorities.

Plaintiff in Error has set forth a number of assignments of errors. Assignments numbered 1, 2 and 3 deal with matters brought out on cross-examination by Defendant in Error, and inasmuch as

Plaintiff in Error has not cited any authorities or shown in any manner how he was prejudiced by this line of cross-examination, we shall pass the same without further comment except to state that we submit the examination was entirely proper and that no error can be predicted upon the showing made in the record. Assignments of error numbered 4 and 5 are not well taken for the reason that Plaintiff in Error made no offer of proof after the court sustained Defendant in Error's objection to the question. No authorities need be cited to show that before any error can be predicted upon the action of the court in sustaining the objection to a question that an offer of proof must be made showing what testimony is desired to be introduced, and this is, of course, true where the question does not of necessity disclose what the party desires to prove. We believe that no authorities need be cited upon the first five assignments of error, as we do not believe Plaintiff in Error is considering them seriously.

We submit that the trial court was correct in sustaining the motion of Defendant in Error for a directed verdict. The court, in allowing the motion, stated quite clearly upon what grounds the motion was sustained, but we submit that the court was not only right in sustaining the motion upon the ground as set forth by him, but that the motion should likewise have been sustained upon any one of the various grounds set forth by the Defendant in Error at the time it made the request for the directed verdict (Tr. 100-101-102). As shown by the court's statement to the jury at the time he granted the motion

for a directed verdict, he disclosed very clearly that these notes were partnership property, and if Plaintiff in Error had any right to any part of them it was necessary for him to ask for an accounting and go into a court of equity. The statement of the court is so plain and so conclusive that we don't believe Plaintiff in Error will seriously contend that any other rule should prevail. The record is clear and convincing that the notes in question were partnership property and that Plaintiff in Error and Guy were partners in reference to them, and that therefore Plaintiff in Error could not maintain an action in respect to these notes in the form and in the manner as set forth in his complaint. And, in addition to that, the court very properly stated that the statute of limitations was a bar to the action (Tr. 102), which will be discussed more fully hereafter, and we therefore respectfully submit that the trial court did not err in granting the motion for a directed verdict, as is shown by the following authorities:

I.

The fact that Guy and the Plaintiff in Error were partners in the ownership of the property in question precludes an action on the part of Plaintiff in Error alone, and this is true even though the alleged conversation took place with the consent of the co-partner. This was expressly so decided in the case of *Sidclar vs. Walker*, 27 N. E. 59 (Ill.), in which the Court said this:

“A partner's right to a partnership property is an ownership of all the assets of the firm, sub-

ject to the ownership of every other co-partner; all other partners holding all the firm assets subject to the payment of the partnership debts and liabilities. It is clear, therefore, that the individual interest of the partner in the firm property and business can only be ascertained by a settlement of the partnership. Until plaintiff's actual interest in the partnership has been determined, there can be no ascertainment of his damages."

It would seem, therefore, that there can be no question but what Plaintiff in Error has no standing in this court upon the record as disclosed in this action.

II.

Assuming, however, that he did own this property jointly with Guy and that his interest was a half interest, even so, under the circumstances as disclosed here, the Plaintiff in Error did not make out a case. The record here discloses that the Bank of Montana came into possession of these notes which Plaintiff in Error claims were converted, by a sale under collateral pledge agreement by the First National Bank of Forsyth, and therefore the Bank of Montana became the absolute owner of this property and it could do with it as it saw fit. Upon coming into possession of the property, if it so desired, it could sell the notes to whomsoever it wanted to, and when it delivered the notes to W. F. Guy it was clearly within its rights. This has been passed upon so frequently that the principle is now well settled. Jones on Pledges, Paragraph 418, makes the follow-

ing statement:

“The pledgee may assign his interest in the pledge and the assignee will stand in his place.”

Paragraph 422 by the same author says this:

“A pledger cannot therefore, upon an assignment of the pledge by the pledgee, with the debt secured, maintain an action of trover against him as for a conversion of the property though his assignee may have converted the pledge to his own use; nor can the pledgor maintain replevin or detinue for the thing pledged in the hands of the pledgee’s assignee without paying or tendering the debt secured by the pledge. Such an action assumes an immediate right of possession in the pledgor, but he has no such right without paying off the debt.

“A pledgee may sell or assign the thing pledged, and the pledgor cannot recover the property of the purchaser without paying or tendering him the amount due thereon.”

No matter what position Plaintiff in Error may desire to take in this controversy, it cannot be denied that Defendant in Error at the time it purchased these alleged Morley notes from the First National Bank of Forsyth, succeeded to all the rights of that bank to the property in question. It at least succeeded to its rights in those notes. We submit, however, insofar as the record discloses here, that upon the sale of the Morley notes by the Bank at Forsyth the Bank of Montana thereupon became the absolute owners of those notes unless there could be some showing made that the sale was not legal,

and there hasn't been any showing made insofar as this record is concerned.

In the case of *Williams vs. Ashe*, 43 Pac. 595 (Cal.), we find the following principle of law laid down by the court, which we believe is applicable to the facts here:

“We are, however, here concerned not particularly with the rights of one who, in the belief that he was purchasing absolute title, has bought property from a pledgee under circumstances which, as found by the jury, did not vest any title in him. Does the purchaser under such circumstances obtain no property or interest in the goods, or does he at least succeed, by purchase, to the interest of the pledgee. * * *

But, whatever may be the foundations for the distinction, it is now most firmly established in the law that a pledgee may sell or assign either the property, or his interest in it, to a bona fide purchaser, who will be allowed to hold the property until extinguishment of the original obligation. The only question which, under the circumstances, would seem to admit of controversy, is whether the creditor to whom the transfer is made should be permitted to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as if the case was a naked tort without any qualified right in the first pawnee. The hardship and injustice of the latter alternative have been so obvious to the courts that late decisions have removed the

doubt expressed until the rule may be taken as settled that the purchaser under such circumstances succeeds to the rights of the original pledgee. And there can be no reason why it should not be so. If one purchases what he believes to be the absolute title he should not, for his mistake, be denied the right of taking the property which the seller (the pledgee) could convey. It works no hardship upon the pledgor who, as against the substituted pledgee, has all the rights he possessed against the pledge."

To the same effect we see the following cases:

Jarvis vs. Rogers,

15 Mass. 389;

Belden vs. Perkins,

78 Ill. 449;

Moffat vs. Williams,

36 Pac. 914;

Talty vs. Trust Company,

39 U. S. 321;

Brittan vs. Oakland Bank of Savings,

57 Pac. 84.

III.

Plaintiff in Error was not entitled to maintain his action even though he might be considered the owner of one-half interest of the notes in question, for the reason that he has not alleged in his complaint, nor was there any evidence offered to the effect that he was willing to pay or tender to the Defendant in Error the original amount which he owed to the First National Bank of Forsyth or to the Bank of Montana. See the following authorities:

Jones on Pledges, Paragraph 570;
Bowers on Conversion, Section 76;
Talty vs. Trust Company (Supra);
Cooper vs. Ray,
47 Ill. 53;
Jarvis vs. Rogers (Supra);
Cumnock vs. Newbury Port Savings Institution,
7 N. E. 869 (Mass.);
Glidden vs. Mechanic's National Bank,
42 N. E. 995 (Ohio);
Wilkins vs. Redding,
97 N. W. 238 (Nebr.);
Dearborn vs. Patterson,
19 Mont. 231.

The Court in the Montana case last above cited said this:

“By mere conversion of a pledge, a pledgee does not necessarily annul the contract upon which it rests. A conversion by a pledgee does not per se absolve the pledgor from the payment of the debt he has secured. As a rule, before a pledgor can recover the property pledged, or its value, in an action for conversion, he must establish a right of possession. Without right of possession such a suit is not maintainable; and the right to the possession of the property which he has pledged follows from the extinguishment of the debt secured or a sufficient tender of payment of such debt. A tender of what was due Murray was essential for the establishment of the right of plaintiff to recover in this action.”

It would seem, therefore, that there can be no question but that Van Atta, before he could maintain any action against the Defendant in Error, no matter what view of the law or upon what theory he might frame his case, he would be obliged nevertheless to allege and prove tender of payment of the amount that he owed the bank. He cannot be heard to say that he doesn't owe the bank anything because the bank sold the notes to Guy, and at the same time say that the bank converted the notes by selling them to Guy. Such a proposition is untenable.

IV.

Plaintiff in Error, under the facts as disclosed by this record, cannot maintain an action against the Bank of Montana or the defendant bank, for the reason that the defendant bank, by bona fide transaction, disposed of the notes in question to W. F. Guy. If Van Atta has any action at all it is, therefore against Guy, who became the defendant bank's successor to the note in question at the time W. F. Guy gave his note to the bank, subject nevertheless, of course, to the collateral pledge agreement which Guy gave to the bank at that time.

This question arose in the cases of *Goss vs. Emerson*, 23 N. H. 38, and *Bank of Forsyth vs. Davis*, 38 S. E. 836 (Ga.) in which latter case the Court laid down the following proposition of law:

“The controlling question in this case is whether the payee of a negotiable promissory note with whom other notes of like character have been deposited as collateral security, is liable to the depositor for conversion of the collat-

erals by one to whom the payee had transferred the principal note and who, as a result of such transfer, came into the possession of the collaterals. The solution of this question depends on whether the payee in the original note had a right to transfer the collaterals. He was certainly authorized to transfer the principal note which was his property. If he could transfer the debt due him, is there any good reason why he should not have been allowed, at the same time, to transfer the property which he had received in pledge to secure the principal note?

* * * When the pawnee transfers his debt and delivers to the transferee the property given to secure the debt, the transaction is not a sale of the pledge but simply places the transferee in the same position which the original creditor occupied. $\frac{1}{2}$ * * The section of our code which authorizes the pawnee to transfer the debt, and with it the thing pawned, seems to be a codification of the common-law. * * *

V.

Again the Plaintiff in Error could not under any circumstances maintain an action for conversion against the defendant bank even if the bank did convert the notes in question by foreclosing the mortgage which secured them. This would be true even though the sale of the notes by the First National Bank of Forsyth under its pledge agreement, and also the sale of the notes in question by the defendant bank under its pledge agreement with Guy were illegal. This question has been before the court so

frequently that there can be no question about it.

See the following cases:

Blood vs. Shepard,

77 Pac. 565 (Kan.);

Ross vs. Barker,

78 N. W. 730;

Winchester vs. Joslyn,

72 Pac. 1076 (Cal.);

McArthur vs. Magee,

45 Pac. 1068 (Cal.);

Glidden vs. Mechanic's National Bank (Supra);

Whipple vs. Dutton,

56 N. E. 581 (Mass.).

In the case of Blood vs. Shepard (Supra) the Court said this:

“Were the transaction one involving simply a choses in action, there being no real estate mortgage securing them, there would probably be no contention as to the character of the holding or the right of the pledgee, but these bonds of the Rosemont Land Co., were secured by a mortgage. This, however, was but an incident to them; and the law is that when a mortgage which secures choses thus held, is foreclosed and the land bid in by the pledgee, the land becomes, by substitution, the collateral security instead of the choses which the mortgage had before that secured, and as such is governed by the law of pledges and not mortgages.”

In the case of Winchester vs. Joslyn (Supra) the following proposition of law was laid down:

“The sale not having been authorized by the

pledgee and it not being a judicial sale, is conceded to be illegal. The appellant contends that the action of the appellee in purchasing the pledged property at the sale was tantamount to the conversion of the stock and subjects the pledgee to an accounting for its market value at the time of the conversion. The rule is not as the appellant asserts. When collateral security is purchased by the pledgee, the pledgor has an election to either ratify or disaffirm the sale. If he ratifies the sale, the title to the security becomes absolute. If he disaffirms it, the property remains in the hands of the pledgee, as security, subject to the right of the pledgor to redeem by a payment of the debt."

In the case of *McArthur vs. Magee* (Supra), the following statement of law is found:

"An action to foreclose a mortgage which has been assigned as collateral security for the principal debt, is not an action for the recovery of the principal debt, but to preserve and enforce the security, which is a duty imposed upon the creditor by the contract of hypothecation, and the principal debt need not be enforced in such action. Magee was thus entitled, if indeed it was not his duty to do exactly as he did, foreclose the *McArthur* mortgage, obtain a deficiency judgment, and collect by foreclosure, the proceeds of the pledged notes and mortgage, and not doing any or all of these things he was not chargeable with conversion. He was also entitled to purchase at the *McCormick* sale as he

did. And in the absence of fraud he took a free and absolute title and was required only to account to McArthur for the proceeds. *Kelly vs. Matlock* 24 Pac. 642. Under these circumstances, McArthur's rights are to demand an accounting, under which the proceeds of the McCormick foreclosure would be applied, to reduce or extinguish Magee's personal judgment against McArthur, and Magee would be required to pay over any surplus in funds, or to assign over, after reimbursing himself, whatever personal judgment for deficiency he might still hold against McCormick. But this is not what plaintiff sues for. He has not put defendant in default by demanding such an accounting. He does not plead a refusal so to act, or any facts from which such a refusal might be inferred; for all that appears in the complaint, defendant may have done for and given to plaintiff all that he was entitled to demand."

In view of the authorities above cited, it would therefore seem without question that even though we should accept the theory as advanced by Plaintiff in Error, there would still be no conversion on the part of the Defendant in Error.

VI.

Plaintiff in Error cannot maintain his action for conversion against the Defendant in Error, for the reason that the record shows conclusively that the Bank of Montana obtained title to this property through a sale of the pledged property by the First National Bank of Forsyth, and that it further ob-

tained title to this property at the time it was sold under the pledge agreement with Guy.

Counsel for Plaintiff in Error seemed to be laboring under the impression that these sales cannot be made in this way, for the reason that, as he states, they are not made in accordance with the Montana Statute. By referring to the collateral pledge agreements it will be noticed that both of them provide for the sale of the pledged collaterals without notice, and at either public or private sale, and the courts have held that such a contract is valid and binding upon the parties. The California statute is identical with the Montana Code Provisions. It has been held time and again that the parties may waive the statutory provisions by signing agreements providing for the sale of collaterals, without notice, by public or private sale.

Jones on Pledges, paragraph 631 says:

“The power of sale may provide for a private sale or a sale at public auction, and it may provide for a notice to the pledgor or for a sale without notice.”

To the same effect see:

McArthur vs. Magee (Supra);

Williams vs. Hahn,

45 Pac. 851 (Cal.);

Lowe vs. Ozmun,

86 Pac. 729.

VII.

The action of the Plaintiff in Error, as disclosed by the record of this case, was barred by the Statute of Limitations, which was pleaded as a defense. The

answer pleaded the third subdivision of Section 6447 of the Revised Codes of the State of Montana (1907) as a bar to plaintiff's action, but upon the trial this was amended to read the third subdivision of Section 6449 (Tr. 102).

The particular provision of our code which indicates that this action is barred on the part of the Plaintiff in Error reads as follows:

“An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property, shall be barred if not commenced within two years.”

The courts of California in construing a similar statute have held that this particular statute applies to actions involving conversion. See

Horton vs. Jack,

37 Pac. 552;

Lowe vs. Ozmmun,

70 Pac. 87;

Bell vs. Bank of California,

94 Pac. 889.

In the case of Lowe vs. Ozmun (Supra), the Court used the following language:

“This action was brought for an alleged conversion by defendant's testator of certain described personal property, namely, bonds and coupons. The complaint shows that the action was commenced within three years, but not within two years, after the alleged conversion; and the court below sustained the demurrer to the complaint upon the ground that the action was barred by subdivision 1 of section 339, Code

Civ. Proc., which provides that 'an action upon a contract, obligation, or liability not founded upon an instrument in writing' must be brought 'within two years.' There is no doubt that this provision includes the cause of action in the case at bar, unless the latter comes expressly within some other category of limitation. 'Liability,' as used in the section, includes responsibility for torts, and 'is applicable to all actions at law not specially mentioned in other portions of the statute.' *Piller vs. Railroad Co.*, 52 Ga. 42. See also *Raynor vs. Mintzer*, 72 Cal. 590, 18 Pac. 82; *McCusker vs. Walker*, 77 Ga. 212, 19 Pac. 382; *Lattin vs. Gillette*, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115. But we think that the limitation of the cause of action in the case at bar is specifically declared in section 338, Code Civ. Proc., which provides that there may be commenced 'within three years - - - an action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.' The obvious purpose of this provision was to include all actions for torts involving personal property, and we do not think that this purpose can be obscured by invoking strict definitions of the particular words used, or by contrasting them with other words which might have been used, or by nice distinctions between the common-law actions of replevin, detinue, and trover. In cases of unlawful taking or detaining personal property the wronged party has usually the op-

tion of either bringing an action for its specific recovery or an action to recover its value; that is, an action which at common-law would have been replevin or detinue, or trover. Section 338 looks to the wrong,—to the thing itself,—and not to the particular kind of action which may be used to obtain the remedy. This view was expressly declared in *Horton vs. Jack*, which is to be found reported in 37 Pac. 652, and for some reason did not get into the California Reports; and we have not been referred to any other case in this state holding different. In that case the court says: “The question suggested is whether an action for the conversion of goods is barred by subdivision 3 of section 338, Code Civ. Proc. Respondent claims that such an action is not covered by that section, and is therefore included in section 339, and is barred in two years. The complaint shows that the suit was not commenced within two years after the alleged conversion. Subdivision 3, Para. 338, reads: ‘An action for taking, detaining, or injuring any goods or chattels, including actions for the recovery of specific personal property.’ And the Court, after discussing the meaning of ‘conversion’ and quoting from authorities, concludes on the point as follows: ‘The words in the statute are not used to indicate any particular form of action. But I think it applies to all those cases in which the person injured has a remedy in an action of claim and delivery, or for conversion. Certain-

ly, one whose property has been wrongfully taken or detained may sue for conversion, if at the time he was entitled to the possession of it. I think the case falls within the provisions of section 338, and the cause of action was not barred." It is contended by respondent that what is said on the subject in *Horton vs. Jack* is dictum; but, whether or not that case might possibly have been decided without a determination of the point in question, still the court fully considered the point, and declared the law on the subject; and, as the conclusion there reached was, in our opinion, right, we have no hesitancy in following it."

The record in this case discloses without question that Plaintiff in Error knew as early as August, 1915, that the First National Bank of Forsyth had foreclosed its collateral pledge agreement and sold the notes in question to the Bank of Montana. This is shown very clearly by a letter written to Plaintiff in Error, dated August 14, 1915, and which appears in the Transcript of Record on Page 51. Again the record shows that Plaintiff in Error had knowledge of the transactions in question on August 27, 1916 (Tr. 47), and again on August 31, 1916 (Tr. 55), and therefore there can be no question but what the Plaintiff in Error had knowledge that the notes in question were sold by the First National Bank of Forsyth to the Bank of Montana in 1915, and that the Bank of Montana at that time claimed to own them. It therefore appears that the action was not begun within two years after the alleged conversion

took place, and not having been commenced within that time the Statute of Limitations is a bar.

VIII.

The action of the trial court in granting a directed verdict was proper, in view of the fact that the action was brought by plaintiff against the Montana National Bank, when the record discloses that all of the transactions, including the alleged conversion, was with the Bank of Montana. It may be true that the Montana National Bank was a successor in interest to the Bank of Montana, but nevertheless, there is nothing in the pleadings, nor in the evidence, which proves that contention. Counsel for Plaintiff in Error at one time made a motion to amend its complaint to include that allegation but that was never done, and no proof was ever offered showing that the defendant bank was a successor in interest to the Bank of Montana, nor is there any proof showing that it succeeded to all its rights or that it became liable for its torts, if any. The record is clear that the alleged conversion, if any, was done by the Bank of Montana, and not by the defendant bank.

IX.

Further than that, the Plaintiff in Error on the record as disclosed in this case has no standing in court, for the reason that he is barred not only by the Statute of Limitations but because of his laches.

The notes in question were sold by the First National Bank of Forsyth in 1915, and nothing was done by the Plaintiff in Error to protect his rights, if he had any. He was well aware of what was being done and was apparently satisfied. He knew, again,

that his partner, Dr. Guy, had arranged to take care of the firm's indebtedness, as well as the indebtedness of Van Atta himself, with the Bank of Montana, and yet nothing was done to protect himself. Again, he knew that the Bank of Montana was obliged to foreclose its mortgage on the ranch in question in order to protect itself, but no effort was made by him to come in and offer any assistance. He permitted the bank to purchase these notes and to claim ownership of them, and he should not now be heard in any court to assert any title not only to the notes in question or to the property involved.

Counsel for Plaintiff in Error has cited a number of authorities, none of which are in point, upon the facts as disclosed in this record. He cites authorities on the question of collusion and yet there isn't any evidence whatever of collusion. In fact, if there is any evidence of collusion at all it apparently is between Guy and Van Atta. He cites authorities upon the question of tenants in common, or co-tenants, and yet there is nothing in the record to indicate that there is any such question involved in this case. By his own brief, he puts himself out of court, for on Page 31 he says this: "In this transaction those obligations were paid by Guy and he or his wife, whichever it may be, became the owners of them and succeeded to the bank's interest in the pledged notes and he had a right to hold the pledged property as security for these obligations but he did not do that." That in itself shows that plaintiff's case, if any, is against Guy and not against the defendant bank, for the law is too well settled that the bank had an

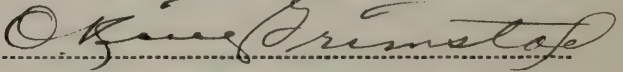
absolute right to sell the notes in question to Guy, or to any one else, just as the First National Bank had an absolute right to sell the notes in the first instance to the Bank of Montana. Is there anything in this record to indicate that the Bank of Montana did not obtain absolute title to these Morley notes at the time it purchased them from the First national Bank of Forsyth, and, having obtained title to them, there is no law forbidding them to sell them to Guy, or to any one else. In fact, having obtained title to them under the collateral pledge sale, they had a right to dispose of them in the open market, or give them away, and neither Guy nor Van Atta could come in and question the transaction. And, assuming that the sale was illegal, although there is nothing in the record to indicate that it was, even under those circumstances the bank would still have a right to dispose of the property to Guy and take Guy's note in payment of the debt, and in so doing plaintiff's remedy, if any, would be against Guy and not against the bank.

It would seem, therefore, that the Plaintiff in Error cannot under any view of the law, whether adopting his theory or not, have any standing in court. As the trial court said, in denying the motion for new trial (Tr. 39), "There seems nothing to the latter as here presented, save an obsession on the part of plaintiff that by some strategical twist or quirk in the law he can gain possession of former partnership property without payment of partnership and his personal debt for which the property was pledged."

For the reasons hereinbefore set forth, we respectfully submit that the trial court did not err in granting the motion of Defendant in Error for a directed verdict.

Respectfully submitted,

GRIMSTAD & BROWN,

By  _____

Attorneys for Defendant in Error,
Billings, Montana.

United States
4
Circuit Court of Appeals
For the Ninth Circuit.

JOHN BACIGALUPI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
First Division.

FILED

MAY 23 1921

F. D. MONCKTON,

CLERK.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

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For Plaintiff and Defendant in Error:

UNITED STATES ATTORNEY, San Francisco, Cal.

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

Clerk's Office.

No. 8657.

UNITED STATES OF AMERICA

vs.

JOHN BACIGALUPL.

Praeceptum (for Transcript on Writ of Error).

To the Clerk of said Court:

Sir: Please prepare transcript on writ of error, to include the following papers and proceedings, viz: Indictment; demurrer to indictment in case of The United States of America vs. John Bacigalupi, et al., being case No. 8657; motion in arrest of judgment; verdict; judgment; assignment of errors; petition for writ of error; order allowing writ of error; writ of error (original); writ of error (lodged copy); citation on writ of error; minute

orders under dates of Sept. 30, 1920; Oct. 6, 1920; Feb. 8, 1920; Feb. 17, 1920.

NATHAN C. COGHLAN,
Attorney for John Bacigalupi.

[Endorsed]: Filed Mar. 1, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

(Indictment.)

At a stated term of said court, begun and holden at the City and County of San Francisco, within and for the Southern Division of the Northern District of California, on the second Monday in July, in the year of our Lord one thousand nine hundred and twenty,—

The Grand Jurors of the United States of America, within and for the Division and District aforesaid, on their oaths present: **THAT**

JOHN BACIGALUPI and MARTIN McGOWAN, hereinafter called the defendants, heretofore, to wit, on August 9th, 1920, at San Francisco, in the Southern Division of the Northern District of California, then and there being, did then and there violate a requirement of the Act of December 17th, 1914, entitled, "An act to provide for the registration of, with Collectors of Internal Revenue, and to impose

*Page-number appearing at foot of page of original certified Transcript of Record.

a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24th, 1919, in that being persons required to register under the terms of said Act, they did then and there unlawfully, wilfully, and knowingly have in their possession, with intent to sell, a certain derivative of coca leaves, to wit, eight bindles of cocaine hydrochloride, 13 grains each, and six bindles of cocaine hydrochloride, 6 grains each, without having registered with the Collector of Internal Revenue, and without having paid the special tax as required by the provisions of said Act. [2]

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT

JOHN BACIGALUPI and MARTIN McGOWAN, hereinafter called the defendants, heretofore, to wit, on August 9th, 1920, at San Francisco, in the Southern Division of the Northern District of California, then and there being, did then and there violate a requirement of the Act of December 17th, 1914, entitled, "An act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, dis-

tribute, or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24th, 1919, in that being persons required to register under the terms of said Act, they did then and there unlawfully, wilfully, and knowingly have in their possession, with intent to sell, a certain derivative of opium, to wit, seventeen bindles of morphine sulphate, 6 grains each, and seven bindles of morphine sulphate twelve grains each, without having registered with the Collector of Internal Revenue, and without having paid the special tax required by the provisions of said Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided. [3]

THIRD COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT

JOHN BACIGALUPI and MARTIN McGOWAN, hereinafter called the defendants, heretofore, to wit, on August 9th, 1920, at San Francisco, in the Southern Division of the Northern District of California, then and there being, did then and there violate a requirement of the Act of December 17th, 1914, entitled, "An act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes,"

as amended February 24th, 1919, in that being persons required to register under the terms of said Act, they did unlawfully, wilfully and knowingly sell, dispense, and distribute, a certain derivative of opium, to wit, six grains of morphine, which said morphine was not then and there in original stamped packages, nor was it taken from original stamped packages.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

FOURTH COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT

JOHN BACIGALUPI and MARTIN McGOWAN, hereinafter called the defendants, heretofore, to wit, on August 9th, 1920, at San Francisco, in the Southern Division of the[4] Northern District of California, then and there being, did then and there violate a requirement of the Act of December 17th, 1914, entitled, "An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24th, 1919, in that being persons required to register under the terms of said Act they did unlawfully, wilfully, and knowingly sell, dispense, and distribute, a certain derivative of coca leaves, to wit, six grains of cocaine,

which said cocaine was not then and there in original stamped packages, nor was it taken from original stamped packages.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

FRANK M. SILVA,
United States Attorney.

[Endorsed]: A true bill. John C. Newlands, Foreman Grand Jury. Presented in open court and ordered filed Aug. 24, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [5]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Thursday, the thirtieth day of September, in the year of our Lord one Thousand and nine hundred and twenty. Present: The Honorable MAURICE T. DOOLING, Judge.

No. 8657.

UNITED STATES OF AMERICA
vs.

JOHN BACIGALUPI.

Minutes of Court—September 30, 1920—
Arraignment.

In this case said defendant was present in court

with attorney, N. C. Coghlan, Esq. W. H. Tully, Esq., Asst. U. S. Atty., was present on behalf of the United States. Said defendant was duly arraigned upon the indictment filed herein, stated his true name to be as contained therein, waived formal reading thereof, and on motion of Mr. Coghlan, the Court ordered that this case be continued to October 2, 1920, for entry of said defendant's plea. [6]

In the Southern Division of the District Court of the
United States for the Northern District of California,
First Division.

No. —.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BACIGALUPI and MARTIN McGOWAN,
Defendants.

Demurrer to Indictment.

Comes now the defendants above named, and demur to each and every and all of the counts set forth in said indictment, and as and for grounds of demurrer, defendants allege:

I.

That the first count of said indictment does not state facts sufficient to constitute an offense against the laws of the United States.

II.

That the said first count of said indictment is un-

certain in that it cannot be ascertained therefrom whether they were persons required to register under the terms of the Harrison Narcotic Act in said count in said indictment more particularly referred to, in that it cannot be ascertained therefrom, and is not alleged therein, whether said defendants are persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or cocoa leaves or their salts, derivatives, preparations, etc.

And demurring to the second count contained in said indictment, defendants allege:

I.

That the second count of said indictment does [7] not state facts sufficient to constitute an offense against the laws of the United States.

II.

That the said second count of said indictment is uncertain in that it cannot be ascertained therefrom whether they were persons required to register under the terms of the Harrison Narcotic Act in said count in said indictment more particularly referred to in that it cannot be ascertained therefrom, and is not alleged therein whether said defendants are persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or cocoa leaves or their salts, derivatives, preparations, etc.

III.

That it does not appear in what capacity said defendants were required to register under the terms of the Harrison Narcotic Act, nor that they were per-

sons required to register under said act, nor whether or not they are persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or cocoa leaves or their salts, derivatives, preparations, etc.

And demurring to the third count contained in said indictment, defendants allege:

I.

That the third count of said indictment does not state facts sufficient to constitute an offense against the laws of the United States.

II.

That the said third count of said indictment is [8] uncertain in that it cannot be ascertained therefrom whether they were persons required to register under the terms of the Harrison Narcotic Act in said count in said indictment more particularly referred to, in that it cannot be ascertained therefrom, and is not alleged therein whether said defendants are persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or cocoa leaves or their salts, derivatives, preparations, etc.

III.

That it does not appear in what capacity said defendants were required to register under the terms of the Harrison Narcotic Act, nor that they were persons required to register under said act, nor whether or not they are persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or cocoa leaves, or their salts, derivatives, preparations, etc.

IV.

That it does not appear from the terms of said count of said indictment, nor can it be ascertained the refrom whether they were persons required to register under the Harrison Narcotic Act, or in what capacity they were required to register under the terms of said act, or whether they were required to register under the said act by reason of the fact that they did produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium, cocoa leaves or their salts, derivatives, preparations, etc.

And demurring to the fourth count of said indictment, defendants allege:

I.

That the fourth count of said indictment does [9] not state facts sufficient to constitute an offense against the laws of the United States.

II.

That the said fourth count of said indictment is uncertain in that it cannot be ascertained therefrom whether they were persons required to register under the terms of the Harrison Narcotic Act in said count in said indictment more particularly referred to, in that it cannot be ascertained therefrom, and is not alleged therein whether said defendants are persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or cocoa leaves or their salts, derivatives, preparations, etc.

III.

That said indictment is uncertain and unintelligible in that it is not therein alleged whether or not

defendants were persons required to register under the terms of the Harrison Narcotic Act.

WHEREFORE, defendants pray that they be hence dismissed, and their bonds exonerated.

NATHAN C. COGHLAN,
Attorney for Defendants.

[Endorsed]: Filed Oct. 6, 1920. W. B. Maling,
Clerk. By C. W. Calbreath, Dep.

Overruled.

M. T. DOOLING,
Judge. [10]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Wednesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable MAURICE T. DOOLING, Judge.

No. 8657.

UNITED STATES OF AMERICA

vs.

JOHN BACIGALUPI and MARTIN McGOWAN.

**Minutes of Court—October 6, 1920—Order
Overruling Demurrer, and Pleas of Defendants.**

This case came on regularly this day for entry of defendants' pleas. Said defendants were present in Court with attorney, N. C. Coghlan, Esq. W. H. Tully, Esq., Asst. U. S. Atty., was present on behalf

of the United States. The Court ordered that the demurrer to the indictment heretofore submitted herein be and the same is hereby overruled, and that defendants plead to indictment. Said defendants were called to plead and each plead "Not Guilty" of the offense charged herein, which pleas the Court ordered and the same are hereby entered. On motion of Mr. Tully, the Court ordered that this case be continued to Nov. 1, 1920, to be set for trial. [11]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Tuesday, the eighth day of February, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable MAURICE T. DOOLING, Judge.

No. 8657.

UNITED STATES OF AMERICA

VS.

JOHN BACIGALUPI and MARTIN McGOWAN.

Minutes of Court—February 8, 1921—Trial.

This case came on regularly this day for the trial of said defendants, who were present in court with attorney, N. C. Coghlan, Esq. W. H. Tully, Esq., Asst. U. S. Atty., was present on behalf of the United States. Upon the calling of the case all parties answering ready for trial, the Court ordered that the

same do proceed and that the jury-box be filled from the regular panel of trial jurors of this court. Accordingly the hereinafter named persons were duly called by lot, sworn, examined, accepted and sworn to try said defendants, viz:

John S. Pinney,	John R. Herman,
Theo. Lerch,	C. B. Hollyhood,
Frank H. Harris,	Ernest S. Jones,
Craig Carrier,	Alfred Madsen,
George P. Caldwell,	M. S. Dodd,
Henry P. Martine,	A. H. Gregory,

Mr. Tully made statement to the Court and jury of the nature of the case and called A. A. Elliott and C. F. Miller, each of whom was duly sworn and examined on behalf of the United States, and introduced in evidence on behalf of the United States certain exhibits, which were filed and marked United States Exhibits Nos. 1 (envelope and contents), 2 (2 small packages), and 3 (letter), and thereupon rested case on behalf of the United States. [12]

Mr. Coghlan then called Martin McGowan (defendant), who was duly sworn and examined on behalf of defendants, and thereupon rested case of defendants.

Mr. Tully called in rebuttal Francis Krull, C. T. Stevenson and E. L. Erwin, each of whom was duly sworn and examined on behalf of the United States.

Mr. Coghlan then recalled Martin McGowan, for further examination, and called A. Giorgi, who was duly sworn and examined on behalf of defendants.

The case was then argued by Mr. Coghlan and Mr. Tully and submitted; whereupon the Court pro-

ceeded to instruct the jury herein, who after being so instructed retired at 3:45 o'clock P. M. to deliberate upon a verdict and subsequently returned into court at 4:15 o'clock P. M., and upon being called all twelve (12) jurors answered to their names, and in answer to question of Court stated that they had agreed upon a verdict and presented a written verdict which the Court ordered filed and recorded, viz: "We, the Jury, find as to the defendants at the bar as follows: John Bacigalupi, Guilty on all 4 counts—Martin McGowan Not Guilty on all 4 counts. Ernest S. Jones, Foreman." Thereupon the Court ordered that the jurors herein be discharged from further consideration of this case and excused from attendance upon the Court until February 17, 1921, at 10 o'clock A. M. Further ordered that defendant, Martin McGowan, be discharged and that he go hence without day as to the indictment herein, and that the bond heretofore given for his appearance herein be and the same is hereby exonerated. After hearing the respective attorneys, the Court ordered that this case be continued to February 15, 1921, for pronouncing of judgment upon defendant, John Bacigalupi, and that in the meantime said defendant go at large upon bond heretofore for his appearance herein. [13]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8657.

THE UNITED STATES of AMERICA

vs.

JOHN BACIGALUPI and MARTIN McGOWAN.

(Verdict.)

We, the Jury, find as to the defendants at the bar as follows: John Bacigalupi—Guilty on all 4 counts; Martin McGowan—Not Guilty on all 4 counts.

ERNEST S. JONES,
Foreman.

[Endorsed]: Filed Feb. 8, 1921, at 4 o'clock and 15 minutes P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [14].

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No.—.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BACIGALUPI,

Defendant.

Motion in Arrest of Judgment.

Comes now, John Bacigalupi, the defendant named in the above-entitled cause, and against whom a verdict of guilty was rendered against on the 8th day of February, 1921, and moves the above-entitled court to arrest the judgment against him and hold for nought the verdict of guilty rendered against him, for the following reasons:

I.

Because the first count of the indictment on file in the above-entitled cause does not state facts sufficient to constitute an offense against the laws of the United States of America.

II.

Because the said first count of said indictment is uncertain in that it cannot be ascertained therefrom whether said John Bacigalupi was a person required to register under the terms of the Harrison Narcotic Act, in said count of said indictment more particularly referred to, in that it cannot be ascertained in said first count of said indictment, and is not alleged therein, whether said defendant was a person who produced, or imported, or manufactured, or compounded, or dealt in, or dispensed, or sold, or distributed or gave away opium or cocoa leaves or their salts, derivatives, preparations, etc. [15]

III.

Because the second count of said indictment does not state facts sufficient to constitute an offense against the laws of the United States of America.

IV.

Because the said second count of said indictment is uncertain in that it cannot be ascertained therefrom whether the said defendant was a person required to register under the terms of the Harrison Narcotic Act in said count in said indictment more particularly referred to, in that it cannot be ascertained therefrom, and is not alleged therein, whether said defendant was a person who produced, imported, manufactured, or compounded, or dealt in, or dispensed, or sold, or distributed, or gave away opium or cocoa leaves or their salts, derivatives, preparations, etc.

V.

Because it does not appear from and is not alleged in said second count of said indictment in what capacity, if at all, said defendant was required to register under the terms of the Harrison Narcotic Act, nor that he was a person required to register under said act, and it does not appear therein whether or not he was a person who produced, or imported, or manufactured, or compounded, or dealt in, or dispensed, or sold or distributed, or gave away opium or cocoa leaves or their salts, derivatives, preparations, etc.

VI.

Because the third count of said indictment does not state facts sufficient to constitute an offense against the laws of the United States.

VII.

Because the said third count of said indictment is uncertain in that it cannot be ascertained therefrom whether said defendant was a person required to

register under the terms [16] of the Harrison Narcotic Act, in said count in said indictment more particularly referred to, in that it cannot be ascertained therefrom, and is not alleged therein, whether said defendant was a person who produced, or imported, or manufactured, or compounded, or dealt in, or dispensed, or sold, or distributed, or gave away opium or cocoa leaves, or their salts, derivatives, preparations, etc.

VIII.

Because it does not appear in said third count of said indictment, and is not alleged therein, in what capacity said defendant was required to register under the terms of the Harrison Narcotic Act, nor that he was a person required to register under said act, or whether or not he was a person who produced, or imported, or manufactured, or compounded, or dealt in, or dispensed, or sold, or distributed, or gave away opium or cocoa leaves or their salts, derivatives, preparations, etc.

IX.

Because it does not appear from the terms of said third count of said indictment, nor can it be ascertained therefrom, whether said defendant was a person required under the Harrison Narcotic Act, nor in what capacity he was required to register under the terms of said act, or does it appear therein whether he was required to register under the said act by reason of the fact that he did produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium, cocoa leaves or their salts, derivatives, preparations, etc.

X.

Because the fourth count of said indictment does not state facts sufficient to constitute an offense against the laws of [17] the United States.

XI.

Because the said fourth count of said indictment is uncertain in that it cannot be ascertained therefrom whether said defendant was a person required to register under the Harrison Narcotic Act, in said count in said indictment more particularly referred to, in that it cannot be ascertained therefrom, and is not alleged therein, whether said defendant was a person who produced, imported, or manufactured, or compounded, or dealt in, or dispensed, or sold, or distributed, or gave away, opium, or cocoa leaves or their salts, derivatives, preparations, etc.

XII.

Because said indictment is uncertain and unintelligible in that it does not therein allege whether or not defendant was a person required to register under the terms of the Harrison Narcotic Act.

XIII.

Because of each, every and all of the grounds and reasons which are set forth in the demurrer to the indictment herein which is on file in the above-entitled cause.

XIV.

Because on the trial of this cause the evidence was insufficient to show jurisdiction of this court to hear and determine this cause.

WHEREFORE, John Bacigalupi, the said defendant, prays that this his motion be sustained and

that the judgment of conviction against him be arrested and held for nought, and that he have all said other orders as may be just and proper in the premises, and he will ever pray.

NATHAN C. COGHLAN,
Attorney for John Bacigalupi, Def.

[Endorsed]: Filed Feb. 17, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [18]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Thursday, the seventeenth day of February, in the year of our Lord one thousand nine hundred and twenty-one.

No. 8657.

UNITED STATES OF AMERICA

vs.

JOHN BACIGALUPI.

Minutes of Court—February 17, 1921—Order Denying Motion in Arrest of Judgment, etc.

This case came on regularly this day for pronouncing of judgment upon said defendant, who was present in court with attorney, N. C. Coghlan, Esq. W. H. Tully, Esq., Asst. U. S. Atty., was present on behalf of the United States. Said defendant was called for judgment. Thereupon Mr. Coghlan presented and filed motion for new trial, which motion

the court ordered denied. Thereupon Mr. Coghlan presented and filed motion in arrest of judgment, which motion the Court also ordered denied, and to which orders of denial, Mr. Coghlan entered an exception. After hearing the respective attorneys, and no cause appearing why judgment should not be pronounced herein, the Court ordered that said defendant, for the offense of which he stands convicted, be imprisoned for the period of two (2) years in the United States Penitentiary at McNeil Island, State of Washington, and that said defendant stand committed to the custody of the U. S. Marshal to execute said judgment, and that commitment issue accordingly.

Mr. Coghlan thereupon presented and filed petition for writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, assignment of errors, whereupon the Court granted [19] said petition, and ordered that defendant give bond pending the determination of such appeal in the sum of \$5,000.00, and in default thereof said defendant stand committed. On motion of Mr. Coghlan it is further ordered that said defendant have one day within which to give and file such bond, and that in the meantime he go at large upon the bond heretofore given for such appearance. Further ordered that upon the giving and filing of the aforesaid bond, that the bond heretofore given for defendant's appearance herein in the sum of \$2,500.00 be exonerated. [20]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8657.

Convicted Viol. Harrison Narcotic Act (Act Dec. 17, 1914, as Amended by Act Feb. 24, 1919).

UNITED STATES OF AMERICA

vs.

JOHN BACIGALUPI.

Judgment on Verdict of Guilty.

W. H. Tully, Esq., Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the indictment filed on the 24th day of August, 1920, charging him with the crime of violating the Harrison Narcotic Act; of his arraignment and plea of Not Guilty; of his trial and the verdict of the jury on the 8th day of February, 1921, to wit:

“We, the Jury, find as to the defendants at the bar as follows: John Bacigalupi Guilty on all 4 counts. Martin McGowan—Not Guilty on all 4 counts.

ERNEST S. JONES

Foreman.”

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein, and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judg-

ment, thereupon the Court rendered its judgment, That, Whereas, the said John Bacigalupi having been duly convicted in this court of the crime of violating the Harrison Narcotic Act;

It IS THEREFORE ORDERED AND ADJUDGED that the said John Bacigalupi be imprisoned for the period of two (2) years in the United States Penitentiary at McNeil Island, State of Washington.

Judgment entered this 17th day of February, A. D. 1921.

WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: Entered in Vol. 10 Judg. and Decrees, at page 301. [21]

In the Southern Division of the District Court of the
United States for the Northern District of California, First Division.

No. —

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BACIGALUPI,

Defendant.

Petition for Writ of Error.

To the Honorable Judge of the Above-entitled Court:

Now comes John Bacigalupi, the defendant in the above-entitled cause, and says: That on the 8th day of February, 1921, this Court entered judgment and sentence herein against said defendant, in which said judgment and sentence, as also in the proceedings had prior thereto in this cause, certain errors were committed to the manifest prejudice of this defendant, all of which will appear more in detail in the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

JOHN BACIGALUPI,
Petitioner.

NATHAN C. COGHLAN,
Attorney for Petitioner.

[Endorsed]: Filed Feb. 17, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [22]

In the Southern Division of the District Court of the
United States for the Northern District of California,
First Division.

No. —

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BACIGALUPI,

Defendant.

Assignment of Errors.

Now comes the above-named defendant, and files herein the following assignment of errors upon which he will rely upon his prosecution of the writ of error in the above-entitled cause:

I.

The Court erred in overruling the demurrer of defendant to the indictment on file herein.

II.

The Court erred in denying the motion made by this defendant in arrest of judgment.

WHEREFORE, this defendant prays that the judgment heretofore given and made in and by the said District Court be reversed.

NATHAN C. COGHLAN,
Attorney for said Defendant.

[Endorsed]: Filed Feb. 17, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [23]

In the United States Circuit Court of Appeals for
the Ninth District.

No. 8657.

JOHN BACIGALUPI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error (and Order Allowing Writ)—Copy.

The President of the United States, to the Honorable Judges of the Southern Division of the District Court of the United States for the Northern District of California, First Division,
GREETING:

Because in the record and proceedings, as also in the rendition of the judgment and sentences in a certain proceeding which is in said District Court before you or some of you, between the United States of America, plaintiff, and John Bacigalupi, defendant, manifest error hath happened, to the great damage of said defendant, as by his complaint appears, and we being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the party aforesaid in his behalf, do command you, if judgment and sentence be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this

writ, so that you have the same at San Francisco, California, in said Circuit on the 21st day of March, 1921, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to [24] correct that error *that* which of right and according to the laws and customs of the United States ought to be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 17th day of February, 1921, in the one hundred and forty-fifth year of the Independence of the United States of America.

[Seal]

Attest: W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

And now on this 17th day of February, 1921, it is ordered that the foregoing writ be and is hereby allowed.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Feb. 17, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [25]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No.—.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BACIGALUPI,

Defendant.

Citation on Writ of Error—Copy.

To the President of the United States of America,
and FRANK M. SILVA, United States District
Attorney for the Northern District of California:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Judicial District, to be held at the city of San Francisco, State of California, on the 21st day of March, 1921, pursuant to the writ of error filed in the clerk's office of the Southern Division of the United States District Court for the Northern District of California, First Division, wherein John Bacigalupi, is plaintiff in error and the United States is defendant in error, to show cause, if any there be, why judgment and the said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States

Supreme Court, this 17th day of February, 1921.

M. T. DOOLING,

United States District Judge for the Northern District of Calif.

[Seal] Attest: WALTER B. MALING.

Clerk.

By C. W. Calbreath,

Deputy Clerk. [26]

[Endorsed]: Filed Feb. 17, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [27]

Certificate of Clerk U. S. District Court to Transcript on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 27 pages, numbered from 1 to 27, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the case of the United States of America vs. John Bacigalupi, No. 8657, as the same now remains on file and of record in this office; said transcript having been prepared pursuant to the praecipe for transcript on writ or error (copy of which is embodied in this transcript) and the instructions of the attorney for defendant and plaintiff in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ or error is the sum of nine dollars and fifty-five cents (\$9.55), and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto are the original writ of error (page 29), return to writ of error (page 32), and original citation on writ of error (page 33).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of March, A. D. 1921.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk. [28]

In the United States Circuit Court of Appeals for
the Ninth District.

No.—.

JOHN BACIGALUPI,

Plaintiff in Error.

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error (and Order Allowing Writ)—Original.

The President of the United States, to the Honorable Judges of the Southern Division of the District Court of the United States for the Northern District of California, First Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment and sentences in a certain proceeding which is in said District Court before you or some of you, between the United States of America, plaintiff, and John Bacigalupi, defendant,

manifest error hath happened, to the great damage of said defendant, as by his complaint appears, and we being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the party aforesaid in his behalf, do command you, if judgment and sentence be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit, on the 21st day of March, 1921, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein [29] to correct that error *that* which of right and according to the laws and customs of the United States ought to be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 17th day of February, 1921, in the one hundred and forty-fifth year of the Independence of the United States of America.

[Seal]

Attest: W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

And now on this 17th day of February, 1921, it is ordered that the foregoing writ be and is hereby allowed.

M. T. DOOLING,
District Judge. [30]

[Endorsed]: No. 8657. In the United States Circuit Court of Appeals for the Ninth District. John Bacigalupi, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error (and Order Allowing Writ). Filed Feb. 17, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [31]

Return to Writ of Error.

The Answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within Writ of Error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 1st day of March, A. D. 1921, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal]

WALTER B. MALING,
Clerk U. S. District Court, Northern Dist. of California.

By C. M. Taylor,
Deputy Clerk. [32]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. —.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BACIGALUPI,

Defendant.

Citation on Writ of Error—Original.

To the President of the United States of America,
and FRANK M. SILVA, United States District Attorney for the Northern District of California:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Judicial District, to be held at the city of San Francisco, State of California, on the 21st day of March, 1921, pursuant to the writ of error filed in the clerk's office of the Southern Division of the United States District Court for the Northern District of California, First Division, wherein John Bacigalupi, is plaintiff in error and the United States is defendant in error, to show cause, if any there be, why judgment and the said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States Supreme Court, this 17th day of February, 1921.

M. T. DOOLING,
United States District Judge for the Northern District of Calif.

[Seal] Attest: WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk. [33]

[Endorsed]: No. 8657. In the Southern Division of the United States District Court for the Northern District of California, First Division. United States of America, Plaintiff, vs. John Bacigalupi, Defendant. Citation on Writ of Error. Filed Feb. 17, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 3664. United States Circuit Court of Appeals for the Ninth Circuit. John Bacigalupi, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed March 21, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3664

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN BACIGALUPI,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

NATHAN C. COGHLAN,

*Attorney for Plaintiff
in Error.*

FILED
JUL 1 1907
BY W. H. BONDY

No. 3664

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOHN BACIGALUPI,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The plaintiff in error and one Martin McGowan were jointly indicted for an alleged violation of the act of December 17th, 1914, relating to, generally speaking, narcotics, as amended February 24th, 1919. The indictment contained four (4) counts. The defendants were tried together. Martin McGowan was found not guilty, and the plaintiff in error was found guilty as charged, on all of the four (4) counts. A demurrer had theretofore been interposed to each of the counts of the indictment, and solely upon the points raised by this demurrer plaintiff in error comes into this Court.

Each of the four (4) counts of the indictment herein referred to charge the violation of the act in question and in each of said counts it is stated in terms that at the time of said violation of said act the defendants were "Persons required to register under the terms of said act".

In the first count the defendants were charged with the unlawful possession, with intent to sell, of certain narcotics, they not "having registered with the Collector of Internal Revenue"—and not "having paid the special tax required by the provisions of said act".

In the second count it is charged that "Being persons required to register under the terms of said act" they unlawfully had in their possession, with intent to sell, certain other narcotics, "without having registered with the Collector of Internal Revenue and without having paid the special tax required by the provision of said act".

In the third count it is charged^o that they "Being persons required to register under the terms of said act", sold, etc., narcotics, "not then and there in original stamped packages, nor * * * taken from original stamped packages".

In the fourth count it is alleged that "Being persons required to register under the terms of said act", they unlawfully sold, etc., certain narcotics, "not then and there in original stamped packages", and "not taken from original stamped packages" (pp. 2, 3, 4, 5, 6, Trans.).

The indictment, the demurrer and the minutes affecting them practically constitute the whole record in this case.

Specifications of Error.

The errors claimed by plaintiff in error may be briefly specified as follows:

The Court erred in overruling the demurrer to the indictment as to each of the counts therein contained, because

1. It cannot be ascertained therefrom whether the defendants were persons required to register under the terms of the act in question.

2. It cannot be ascertained therefrom whether the persons therein named are charged with the duty of registration, as provided in the act, by reason of their being producers, importers, manufacturers, compounders, dealers, dispensers, sellers, distributors or donors of the drugs or derivatives thereof mentioned in the said two first counts.

3. That the indictment does not state facts sufficient to constitute any offense against the laws of the United States.

Argument.

That portion of the Act of Congress out of which the charges in this case arose which authorizes the matter set forth in the first and second counts of the indictment, reads as follows:

“It shall be unlawful for *any person not registered under the provisions of this act, and who has not paid the special tax provided for by this act*, to have in his possession or under his control any of the aforesaid drugs” (U. S. Comp. Sta. 1918, p. 998, Compact Edition).

The third and fourth counts find their sanction in the language of the amendment to the act, of date February 24, 1919, which reads:

“It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package” (p. 124, 1919 Sup. to U. S. Comp. Sta., Compact Edition).

The act of which the foregoing quotations are a part declares that,

“On or before July 1 of each year every person *who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away* opium, etc., *shall register* with the collector of internal revenue of his district his *name or style, place of business and place or places where such business is to be carried on*, and pay the special tax as hereinafter provided” (see p. 124, 1919 Sup. to U. S. Comp. Sta., Compact Ed.).

The act in question, it will be remembered, is not a police regulation. It is a revenue measure. The “persons” who may be punished under the statute are only such “persons” as are described therein, to-wit: persons who import, manufacture, sell, deal in, dispense, or give away opium, etc.

It is not alleged in the indictment or in any of its counts that plaintiff in error belongs to any of the enumerated classes of "persons". The pleader has merely in general terms stated a conclusion of law. He has alleged that plaintiff in error was a person "required to register under the terms of the act". This is, of course, patently insufficient. It will not be contended that without proof as to the particular class to which the person charged may belong a verdict would stand; for it is only upon such proof that a jury could find that he was such a person as under the law is required to register.

It needs no citation of authority, of course, to support the general rule that *facts*, and not conclusions, must be averred in an indictment, yet, drawing at haphazard from the body of American Law, it may not be amiss to cite the case of *State v. Graham*, 38 Ark. 319, and *Rank v. People*, 80 Ill. 40, in which latter case it is held that an averment that defendant threatened to accuse a person of a misdemeanor was an averment of a mere conclusion of law. And, passing to another jurisdiction, it is held in *State v. Record*, 56 Ind. 107, that in an indictment against a clerk of a circuit court for failure to pay over funds collected by him, an allegation that such funds are "due and owing to the state of Indiana" cannot supply the place of allegations as to when such funds were collected.

But it is not alone upon this general principle that plaintiff in error need rely.

It is the law that where an offense may be committed *by persons of a certain description only*, defendant must be shown to have been of that description at the time of the act (U. S. v. McCormick, 28 Fed. Cas. No. 16663, 1 Branch, C. C. 593). It is, we think, clear that the mere words "being a person required to register under the act" do not show the defendant in this case to have belonged to any of the classes of "persons of a certain description" referred to in the act here under consideration. That this rule obtains in practically every jurisdiction is manifest from the following:

When the act as to which the offense is predicated is not in itself unlawful, but becomes so by reason of other facts connected with it, such facts must be alleged (Cearfoss v. State, 42 Md. 403; Com. v. Beerblower, 3 Pa. L. J. Rep. 404, 5 Pa. 426; Com. v. Clarke, 2 Ashn. (Pa.) 405; Pearce v. State, 1 Sneed (Tenn.) 63, 60 Am. Dec. 135). An indictment for refusal to obey a subpoena must show the authority under which it was issued (U. S. v. Cover, 46 Fed. 284). In indictments for official misconduct the holding of the office should be specifically charged (Shank v. State, 51 Miss. 464).

So when a statute enacts that anyone of a certain class of persons who shall do or omit a certain act and under certain circumstances shall be guilty of a crime, the indictment must describe the person indicted as one of that class and aver that he did or omitted the act under the circumstances making

it criminal (State v. Sloane, 67 N. C. 357). Where an indictment is based upon violation of a duty imposed against common right, it is necessary to state specifically the facts upon which such duty arises, unless it is imposed by a law or circumstances of which the Court will take judicial notice (State v. Middlesex etc. Traction Co. (N. J. Sup. 1901), 50 Atl. 354; State v. Haddon Field etc. Turnpike Co., 56 N. J. L. 97, 46 Atl. 700; State v. N. J. Turnpike Co., 16 N. J. L. 222; State v. Hageman, 13 N. J. L. 314; Rex v. Great Broughton, 5 Bluir 2700; Rex v. Holland, 5 T. R. 607; Rex v. Penduray, 2 T. R. 513).

For example, where a corporation is indicted for failure to maintain a ferry, it must be shown how defendant under its charter became subject to the duty (State v. Wilmington etc. R. Co., 44 N. C. 243).

In the case of United States v. Woods (and five like cases), 224 Fed. Rep. 278 (Nos. 2645, 2647, 2661, 2663, 2664), the indictments charged that defendant

“did willfully, knowingly, unlawfully and feloniously have in her possession and under her control * * * smoking opium * * * not having theretofore registered with the collector of internal revenue * * * as required under the provisions of the act of Congress of December 17, 1914, and not having theretofore paid the special tax provided for by said mentioned act.”

General demurrers were interposed and the defendants maintained (1) that mere consumers of the drug and in possession of same only for their own consumption are not by the act required to register and pay the tax, and (2) that the *indictments do not show that defendants are of any of the classes* by the act required to register and pay the tax.

In sustaining the demurrers and dismissing the indictments, Bourquin, District Judge, said:

“Having in mind that taxes can be imposed and statutory offenses created only by direct, clear and apt language, it seems clear that there is nothing in the act imposing the duty of registration and payment of taxes upon mere consumers of the drugs. They are not within section 1, and section 8 does not purport to extend the registration and taxation features of the act to them, or to any one, but only to make unlawful mere possession of the drugs by any person of the classes by section 1 required to register and pay, and who have not, and to create a statutory rule of evidence.

“And this latter has misled the prosecution to believe that the essentials of the offense need not be set out in the indictments, but only this rule of evidence—the possession of the drugs, from which in some cases the offense may be inferred; that is, in the cases of those by section 1 required to register and pay the tax. Whenever an *offense can be committed by only certain classes of persons, the indictment must expressly allege that accused is of those classes or it is fatally defective* in substance; for lacking such allegation, all alleged may be true, and accused be innocent.”

The rule laid down in the Woods case, *supra*, is followed in the case of *United States v. Carney*, 228 Fed. Rep. 163 (No. 1158), and the reasoning and language in this case seems to us peculiarly applicable in the case at bar. The indictment in the Carney case (omitting formal parts) charged:

“That on or about the 15th day of September, 1915, at Mason City, Iowa, within the jurisdiction of this Court, the defendant did, knowingly and unlawfully, have in his possession a large quantity of morphine * * *. without having theretofore registered with the collector of internal revenue for the district of Iowa, his name and place of business, and paid said collector the special tax as provided and required by the Act of Congress approved December 17th, 1914, relating to the production * * * of opium * * *, contrary to the statute in such case made and provided.”

The defendant demurred to the indictment upon the ground alone that it charged no offense, and in passing upon the demurrer the Court says:

“The demurrer presents the single question: Does the indictment sufficiently charge the defendant with a violation of any of the provisions of the act? *It is not alleged that defendant was or had been engaged in any business that required him to register and pay the special tax as required by the act; nor is anything alleged showing his possession of the tablets to be unlawful, save only the legal conclusion that defendant did ‘knowingly and unlawfully’ have in his possession the 140 tablets, each containing one-quarter grain of morphine.*

“It is axiomatic that statutes creating and defining crimes cannot be extended by impli-

cation or intendment, and before any one can be rightly punished under a statute creating an offense, the acts done by him must be plainly and unequivocally alleged to be within the offense as created (citing cases).

“It is also a cardinal rule of criminal pleading that an indictment for an offense must *allege directly* and with certainty *every essential element* or ingredient of the offense and *not by way of recital or inference*; that it is not sufficient to allege it in the words of the statute unless those words of themselves set forth clearly, fully, and with certainty every essential ingredient of which the offense consists * * * (In this case they have not even followed the words of the statute).

“With these principles in mind, the statute and indictment in question may be considered. Section 1 provides that on and after March 1st, 1915, every person who produces, imports, manufactures, deals in, dispenses, sells, distributes or gives away any of the drugs mentioned shall register with the proper revenue collector his name and place or places where such business is to be carried on, and pay to the person or persons who engage in dealing in or in some manner handling the drugs as a *part of his or their business* that are to register and pay the required tax, and persons or associations not so engaged are not within its terms. The act is highly penal in its nature and must be so construed as to include only those who are clearly within its terms. * * *

This contention finds further support in the case of the United States v. Jin Fuey Moy, 241 U. S. 394, from the opinion in which case we quote, in part, as follows:

“The indictment charges a conspiracy with Willie Martin to have in Martin’s possession opium. * * * It alleges that Martin was not registered with the collector of internal revenue of the district, and had not paid the special tax required. * * * The question is whether the possession conspired for is within the prohibitions of the act. (Then follow a recital of the provisions of the act.)

“The district judge considered that the act was a revenue act, and that the general words, ‘any person’, must be confined to the *class of persons* with whom the act previously had been purporting to deal. The government, on the other hand, contends that this act was passed with two others in order to carry out the international opium convention (38 Stat. at L. 1929); that Congress gave it the appearance of a taxing measure in order to give it a coating of constitutionality, but that it really was a police measure that strained all the powers of the legislature, and that Sec. 8 means all that it says, taking its words in their plain literal sense.

“A statute must be construed, if fairly possible so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. *If we could know judicially* that no opium is produced in the United States, the difficulties in this case would be less; but we hardly are warranted in that assumption when the *act itself purports to deal with those who produce it*. Congress, at all events, contemplated production in the United States, and therefore the act must be construed on the hypothesis that it takes place. If opium is produced in any of the states, obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime. * * *

“Approaching the issue from this point of view we conclude that ‘any person not registered’ in Par. 8 cannot be taken to mean any person in the United States, but must be taken to refer to the *class with which the statute undertakes to deal*,—the persons who are required to register by Section 1.”

The judgment of the District Court, 225 Fed. 1003, quashing the indictment, was affirmed.

Plaintiff in error contends that from the foregoing decisions there can be only one interpretation of the law relating to narcotics so far as it affects this case, and that interpretation, beyond question, supports the contention here made that the indictment was in no way legally sufficient to overcome the objections herein made by demurrer. Manifestly, it is but a conclusion, which can only be drawn from averment and proof of the fact that the defendant is a member of one of the several classes referred to in the statute, that he was a person “required to register under the terms of the act”. And it is obvious that if it still be the rule that “the indictment must *expressly* allege” that the accused is one of the classes named, then certainly the order of the Court below overruling the demurrer ought not to stand.

Dated, San Francisco,

June 6, 1921.

Respectfully submitted,

NATHAN C. COGHLAN,

*Attorney for Plaintiff
in Error.*

IN THE

United States Court of Appeals

Of the Ninth Circuit

JOHN BACIGALUPI, <i>Plaintiff in Error,</i> VS. THE UNITED STATES OF AMERICA, <i>Defendant in Error.</i>	}
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No. 3664

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR

NATHAN C. COGHLAN,
Foxcroft Building, San Francisco,
*Attorney for Plaintiff
in error.*

FILED

AUG 8 1921

F. D. MONAGHAN
CLERK

IN THE

United States Court of Appeals

Of the Ninth Circuit

JOHN BACIGALUPI,
Plaintiff in Error,
VS.
THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 3664

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR

*To the Honorable William B. Gilbert, Presiding
Judge, and the Honorable The Associated Judges
of the United States Court of Appeals for the
Ninth Circuit:*

Plaintiff in error respectfully petitions this Honorable Court for a rehearing of the above entitled cause.

The position of the Plaintiff in error is stated by the Court in the opinion filed herein August 1, 1921, as follows:

“The plaintiff in error contends that each count of the indictment is fatally defective in that it fails to show that the defendant was a person required to register under the Act, in that it contains no allegation that he was one of the persons who “import, manufacture, produce, compound, sell, deal in, dispense or give away opium,” etc. This statement, while accurate as far as it goes, does not present the position of Plaintiff in error as fully as he desires.

“Plaintiff in error, in this connection, respectfully requests that it be not forgotten that the indictment is also attacked on the ground that it cannot be ascertained therefrom which, if any, of the enumerated classes he belonged to.”

The Court in its opinions considers alone the objections raised by Plaintiff in error to the third and fourth counts of the indictment, which charge, as therein observed, that the defendant “did knowingly, unlawfully, and wilfully *sell, dispense, and distribute*” derivatives of cocoa leaves.

This allegation is deemed to be sufficient to show that he was a person who was required to register under the Act in question. The sole authority for this conclusion appears to be the case of *Pierriero vs. United States*, 271 Fed. 913.

The case cited was one wherein the Plaintiff in error was charged under Section I of the Harrison Narcotic Act and the language there employed by the Court, so far as directly applicable here is as follows:

“It is also contended that to convict under the amended section it must be alleged and proved ‘that the accused is one of those persons required to register and pay the special tax,’ even if untaxed and unstamped drugs be found in his possession. We are not of that opinion. The clause above quoted includes, not only those who purchase, but also those who sell and dispense, and the latter are specifically required to register and pay the special tax. Therefore an indictment in the language of the statute, charging that defendant ‘did sell, dispense and distribute,’ as in this case, alleges by necessary

implication that he is within the class required to register. And if there be proof that unstamped drugs were found in his possession, the clause in question creates the presumption that he has violated the amended section. The burden is then upon him to show that he is not in the class required to register, and that his possession was not unlawful, as was held to be the case in *United States vs. Wilson* (D. C.) 225 Fed. 82."

This case does not, we respectfully submit, sustain the opinion of the Court in the case at bar. In the first place the case of Pierriero does not present a pure question of criminal pleading. In the case at bar the sole question is, does the indictment set forth a public offense under the statute in question in the light of the challenge, warning and demand contained in the demurrer of the defendant. No question of fact and no rule of evidence is here involved. This is not true of the case cited. It does not appear from the report that a demurrer was even interposed in the Pierriero case. The question here raised by Plaintiff in error was not there considered. There is nothing either in that case or any other that we can find depriving the accused of the right to a description of the offense attempted to be charged such as will enable him to prepare his defense and plead his jeopardy.

Under such an indictment as that before us no person can tell whether it is the intention of the government to attempt to prove that the accused is an importer or a manufacturer or a vendor or a dealer in narcotics; and if he should be tried as a

vendor, for instance, can it be said that after judgment he can not, upon the same indictment be again tried as a manufacturer.

A careful reading of the act in question will, we respectfully submit, render this contention peculiarly persuasive. Quite evidently it is against persons engaged in one of the classes of *business* therein referred to that the statute inveighs.

The very language of the first section of the Act positively substantiates this interpretation of the Act. The first section provides that "every person who produces * * * shall register * * * his *name or style, place of business, and place or places where such business is to be carried on*: provided, that the office, or if none, then the residence of any person shall be considered for the purpose of this act to be his *place of business*."

And it is further provided in Section 1 that "all provisions of existing law relating to special taxes, so far as applicable, including the provisions of 3240 of the revised statutes of the United States, are hereby extended to the special tax herein imposed."

In construing an indictment under section 3242 of the Revised Statutes (one of the laws "relating to special taxes referred to in Section 1 of the Act), the Supreme Court, in the case of *Ledbetter vs. United States*, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162, said:

"It is quite evident that an indictment averring in the language of section 18 (Comp. St.

1913, par. 5973), which defines a retail liquor dealer, that the defendant sold or offered for sale the liquors named, *without avering that he made this a business*, and that he had not paid the special tax required by law, would be insufficient."

Clearly, the rule laid down by the Supreme Court in the case of Ledbetter is applicable here. Neither of the counts to which the Court has referred charges that the defendant was conducting a business. On the contrary he is in each charged with a violation of the law because on one occasion he sold the article named.

Again we very respectfully direct the Court's attention to the language used by the Court in *United States vs. Carney*, 228 Fed. Rep. 163 (No. 11587):

"It is axiomatic that statutes creating and defining crimes cannot be extended by implication or intendment, and before any one can be rightly punished under a statute creating an offense, the acts done by him must be plainly and unequivocally alleged to be within the offense as created (citing cases).

"It is also a cardinal rule of criminal pleading that an indictment for an offense must *allege directly* and with certainty *every essential element* or ingredient of the offense and *not by way of recital or inference*; that it is not sufficient to allege it in the words of the statute unless those words of themselves set forth clearly, fully, and with certainty every essential ingredient of which the offense consists * * * (In this case they have not even followed the words of the statute).

“With these principles in mind, the statute and indictment in question may be considered. Section 1 provides that on and after March 1st, 1915, every person who produces, imports, manufactures, deals in, dispenses, sells, distributes or gives away any of the drugs mentioned shall register with the proper revenue collector his name and place or places where such business is to be carried on and pay to the person or persons who engage in dealing in or in some manner handling the drugs as a *part of his or their business* that are to register and pay the required tax, and persons or associations not so engaged are not within its terms. The act is highly penal in its nature and must be so construed as to include only those who are clearly within its terms. * * *

“It seems quite clear that the act in question is to be construed as one imposing a tax upon those who engage in dealing in and handling the drug mentioned *as a part of their business*, and that a *single sale * * * * by one not engaged in the business* of dealing in them, is *not* within the terms of the act.”

The conclusion is inevitable, it seems to us, if the accused was entitled to a pleading which charged him with the offense in question *directly* and *not* by *way of inference*—the judgment in the case at bar ought to be reversed and the demurrer ordered sustained.

It is therefore respectfully submitted that a rehearing of this cause should be granted by this Honorable Court.

Dated, August 31, 1921.

NATHAN C. COGHLAN,
Attorney for Plaintiff
in error.

CERTIFICATE OF COUNCIL.

I hereby certify that I am counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay .

Dated, San Francisco, August 31, 1921.

NATHAN C. COGHLAN,
*Counsel for Plaintiffs in Error
and Petitioners.*

United States
7
Circuit Court of Appeals
For the Ninth Circuit.

BINGER STEWART HERINE, Also Known as
BINGER STEWART HORINE,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
First Division.

FILED
SEP 22 1911
F. D. MONTGOMERY
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

BINGER STEWART HERINE, Also Known as
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First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For Plaintiff and Defendant in Error:

UNITED STATES ATTORNEY, San Francisco, Cal.

For Defendant and Plaintiff in Error:

CHAUNCEY F. TRAMUTOLO, Esq., San Francisco, Cal.

UNITED STATES OF AMERICA.

District Court of the United States, Northern
District of California.

Clerk's Office.

No. 8517.

THE UNITED STATES OF AMERICA

vs.

BINGER STEWART HERINE, etc.

Praeceptum (for Transcript on Writ of Error).

To the Clerk of said Court:

Sir: Please prepare transcript on writ of error to include the following papers and proceedings:
Information.

Minutes of arraignment and plea—June 26th, 1920.

Petition for return of personal property.

Order to show cause.

Bill of particulars.

Return of U. S. Marshal, on service of order to show cause.

Two returns to order to show cause.

Minutes of September 27th and October 2d, 1920.

Verdict and judgment.

Motion for new trial.

Motion in arrest of judgment.

Petition for writ of error and assignment of errors.

Original writ of error with order allowing.

Original citation on writ of error.

Bill of exceptions.

C. F. TRAMUTOLO,
Attorney for Defendant.

[Endorsed]: Filed Mar. 17, 1921. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [1*]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 8517.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BINGER STEWART HERINE,

Defendant.

Information.

At the March Term of said Court in the year of
our Lord one thousand nine hundred and twenty.

BE IT REMEMBERED, that Annette Abbott
Adams, United States Attorney for the Northern

*Page-number appearing at foot of page of original certified Transcript
of Record.

District of California, by and through Albert M. Hardie, Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 22d day of June, 1920, and with leave of said Court first having been had and obtained, gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit, is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents:
THAT

BINGER STEWART HERINE,
hereinafter called the defendant heretofore, to wit, on the 20th day of June, 1920, at San Francisco, in the County of San Francisco, in the Southern Division of the Northern District of [2] California, after the date upon which the Eighteenth Amendment to the Constitution of the United States went into effect did unlawfully, wilfully and knowingly, in violation of section 21 of Title II of the Act of October 28, 1919, known as the "National Prohibition Act, maintain a common nuisance in that he did unlawfully, wilfully and knowingly keep on the premises situated at 457 Ellis Street, known as Summerville Apartments, to wit, Rooms 3, 4 and 5 certain intoxicating liquor, to wit, sherry wine, and port wine containing one-half of one percent or

more alcohol by volume, and then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents: THAT

BINGER STEWART HERINE, hereinafter called the defendant, heretofore, to wit, on the 19th day of June, 1920, at San Francisco, in the Southern Division of the Northern District of California, then and there being, and after the date upon which the Eighteenth Amendment to the Constitution of the United States went into effect, did unlawfully, wilfully and knowingly in violation of section 3 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, sell certain intoxicating liquor, to wit, sherry wine, containing [3] one-half of one per cent or more of alcohol by volume, and then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United

States of America and contrary to the form of the statute of the said United States of America in such cases made and provided.

THIRD COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents:
THAT

BINGER STEWART HERINE,
hereinafter called the defendant, heretofore, to wit, on the 20th day of June, 1920, at San Francisco, in the Southern Division of the Northern District of California, then and there being, and after the date upon which the Eighteenth Amendment to the Constitution of the United States went into effect, did unlawfully, wilfully and knowingly in violation of section 3 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, sell certain intoxicating liquor, to wit, sherry wine, containing one-half of one per cent or more of alcohol by volume, and then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America and contrary to the form of the

statute of the said United States of America in such case made and provided.

ANNETTE ABBOTT ADAMS,

United States Attorney.

ALBERT M. HARDIE,

Assistant United States Attorney. [4]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Harvey A. Deline, being first duly sworn, deposes and says: That Binger Stewart Herine, on the 20th day of June, 1920, at rooms 3, 4 and 5 of Summer-ville Apartments, #457 Ellis Street, in the City and County of San Francisco, in the Southern Division of the Northern District of the State of California and within the jurisdiction of this court, did then and there maintain a common nuisance in that he, the said Binger Stewart Herine, did then and there keep in the above-mentioned premises certain intoxicating liquor, to wit, sherry wine and port wine, containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes.

That the keeping of the said intoxicating liquor by the said Binger Stewart Herine was then and there prohibited unlawful and in violation of section 21, of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

And affiant further deposes and says that Binger Stewart Herine, on the 19th day of June, 1920, at the place above mentioned did then and there sell intoxicating liquor, to wit, sherry wine, containing

one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes. And affiant further deposes and says that on the 20th day of June, 1920, at the place above mentioned, the said Binger Stewart Herine did then and there sell certain intoxicating liquor, to wit, sherry wine, containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes. [5]

That the sales by the said Binger Stewart Herine of the said sherry wine, on the said 19th day of June, 1920, and on said 20th day of June, 1920, as afore-said was then and there prohibited, unlawful, and in violation of section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

HARVEY A. DELINE.

Subscribed and sworn to before me this 21st day of June, 1920.

[Seal]

C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern Dis-
trict of California.

[Endorsed]: Filed Jun. 22, 1920. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [6]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 26th day of June, in the year of our Lord one thousand nine hundred and twenty. Present: the Honorable MAURICE T. DOOLING, Judge.

No. 8517.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BINGER STEWART HERINE.

Minutes of Court—June 26, 1920—Arraignment and Plea.

In this case the defendant was present in court with attorney. On motion of A. M. Hardie, Esq., Asst. U. S. Atty., and on order of Court, said defendant was duly arraigned upon the Information filed herein, stated his true name to be as contained therein, waived formal reading thereof, and thereupon plead "Not Guilty" of the offense charged therein, which plea the Court ordered and the same is hereby entered and this case continued to July 12, 1920, to be set for trial. [7]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 8517.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,

Defendant.

Petition for the Return of Personal Property.

Comes now the above-named defendant and alleges:

I.

That he is a citizen of the United States of America and a resident of the City and County of San Francisco, State of California.

II.

That prior to January 16th, 1920, and at all times hereinafter mentioned, said defendant was the owner of an assortment of liquors and beverages, to wit, whiskey and brandy, which said liquors and beverages were and are the lawful and *bona fide* property of said defendant and were lawfully in his possession at the time of their seizure by Harvey DeLigne, a patrolman of the Police Department of the City and County of San Francisco, State of California.

III.

That the said liquors and beverages, to wit, whiskey and brandy, were seized by Harvey A. Deligne,

a patrolman of the Police Department of the City and County of San Francisco, State of California, on or about the twentieth day of June, 1920, and that the said property is now retained by Harvey A. Deligne and John L. Considine, District Prohibition Enforcement Officer. That the [8] seizure by the above-named officers from the said defendant was in violation of the fourth and fifty amendments to the Constitution of the United States.

IV.

That the Government proposes to use the said above-mentioned seized property, so seized by the above-named officers, against this defendant at the time of his trial, proceedings for which have been instituted charging said defendant with violating the Act of October 28th, 1919, commonly known as the National Prohibition Act, unless this Court orders the return of said property so unlawfully seized.

WHEREFORE defendant prays that the said above-named Harvey A. DeLigne and John L. Considine, and each of them and all other officers responsible for the seizure and retention of said hereinabove described property, be notified, and that the above-entitled court direct and order said above-mentioned officers and any and all other officers responsible for the seizure and retention of said hereinabove described property, to show cause why said property should not be returned to said defendant.

BINGER STEWART HORINE,

Petitioner and Defendant.

C. F. TRAMUTOLO,

Attorney for Defendant. [9]

State of California,

City and County of San Francisco,—ss.

Binger Stewart Herine, also known as Binger Stewart Horine, being first duly sworn, deposes and says:

That he is the defendant named in the foregoing petition; that he has read the same and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief and as to those matters he believes it to be true.

BINGER STEWART HORINE.

Subscribed and sworn to before me this 23 day of September, 1920.

[Seal] GRACE CAMPBELL,
Notary Public in and for the City and County of
San Francisco, California.

[Endorsed]: Filed Sep. 23, 1920. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [10]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8517.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,

Defendant.

Bill of Particulars.

Comes now the above-named defendant and furnished herewith his bill of particulars, and requests that the same be made part of his petition for the return of personal property filed in the above-entitled court on the twenty-third day of September, 1920; and asks that the property seized from him consisting of liquors and beverages, to wit, whiskey and brandy, be returned to him for the following reasons:

I.

That the said property was seized by Harvey A. De Ligne, a patrolman of the Police Department of the City and County of San Francisco, without any lawful authority whatsoever; that the said officer at the time of seizure of the property from defendant was not possessed with a warrant authorizing the seizure of said property.

II.

That the said Harvey A. De Ligne at the time of the arrest of the defendant did not have a warrant for such purpose.

III.

That the said Harvey A. De Ligne did not at the time of the seizure of the property have a search warrant for said purpose. [11]

IV.

That the property seized by said Harvey A. De Ligne at the time of its seizure, to wit, on the twentieth day of June, 1920, was seized from the *bona fide* and lawful domicile of defendant.

By reason of the foregoing facts defendant prays for the return of the personal property seized.

BINGER STEWART HORINE,
Defendant.

CHAUNCEY F. TRAMUTOLO,
Attorney for Defendant.

[Endorsed]: Filed Sep. 24, 1920. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [12]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8517.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,
Defendant.

Order to Show Cause.

The above-named defendant having filed herein his duly verified petition for the return of personal property, and good cause appearing therefor,—

IT IS HEREBY ORDERED that John L. Considine, District Prohibition Enforcement Officer and Harvey A. Deligne, a patrolman of the Police Department of the City of County of San Francisco, and each of them and any and all other officers responsible for the seizure and the retention of the

property described in said petition, appear before this Court at the courtroom thereof in the Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, at the hour of ten A. M. on the 25th day of September, 1920, or as soon thereafter as counsel can be heard, to then and there show cause, if any they have, why they should not be compelled to turn over and deliver the property seized and retained by them as aforesaid to the said defendant.

Dated: The 23d day of September, 1920.

M. T. DOOLING,

Judge. [13]

GOOD CAUSE APPEARING THEREFOR, the time for serving said order is hereby shortened so that the same may be served on or before the 23d day of September, 1920.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Sep. 23, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

(Returns of U. S. Marshal on Service of Order to Show Cause.)

RETURN ON SERVICE OF WRIT.

United States of America,
Nor. District of Calif.,—ss.

I hereby certify and return that I served the annexed order to show cause on the therein named Harvey A. Deligne by handing to and leaving the

same with Harvey A. Deligne, personally, at San Francisco, in said District, on the 25th day of Sept., A. D. 1920.

J. B. HOLOHAN,
U. S. Marshal.
By Thos. F. Mulhall,
Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
Nor. District of Calif.,—ss.

I hereby certify and return that I served the annexed order to show cause on the therein named John L. Considine by handing to and leaving the same with John L. Considine, personally, at San Francisco, in said District, on the 24th day of Sept., A. D. 1920.

J. B. HOLOHAN,
U. S. Marshal,
By Thos. F. Mulhall,
Deputy.

[Endorsed]: Filed Sept. 27, 1920. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [15]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8517.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,

Defendant.

Return to Petition and Order to Show Cause.

Comes now Harvey A. Delign, and for himself and for John L. Considine, and all persons and officers referred to in defendant's petition, bill of particulars and the order to show cause herein for return of certain whiskey and brandy alleged therein to belong to defendant, and for answer to said petition and return to said order to show cause, denies:

I.

That Harvey A. Delign, as a police patrolman or otherwise, or that John L. Considine, as District Prohibition Enforcement Officer or otherwise, or that any person or officer referred to therein on the 20th day of June, 1920, or at any time or ever or at all seized the whiskey and brandy or whiskey or brandy belonging to defendant or seized any whiskey or brandy at all.

II.

That said property or any part thereof is now or

ever was in the possession of or retained by said Harvey A. Delign, or said John L. Considine, or in the possession of or retained by any person or officer known to or of which the parties herein answering or referred to have any knowledge whatever, and in this connection allege the fact to be; that the said Harvey A. Delign does not [16] know, nor does any person or officer answering or for whom answer and return is made know or have any knowledge whatever of the alleged seizure or retention of the said or any whiskey or brandy whatever.

III.

Denies that the Government or the plaintiff or any person proposes or intends to use the said whiskey or brandy, or any part thereof, against this defendant at the or any trial instituted by plaintiff herein against said defendant.

WHEREFORE, Harvey A. Delign, John L. Considine, and all persons for whom this answer and return is made, pray that the said petition for return of said whiskey and brandy be dismissed and the order for the return of the said property prayed for be denied, and that plaintiff may have judgment for its costs in this behalf incurred.

HARVEY A. DELINE,

FRANK M. SILVA,

United States Attorney.

BEN F. GEIS,

Asst. United States Attorney,

Attorneys for Plaintiff. [17]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Harvey A. Delign, being first duly sworn, deposes any says: That he is the Harvey A. Delign, named and referred to in the petition and order to show cause in the above and within entitled action. That he makes the above answer and return to defendants petition and the order to show cause herein for himself and for the said John L. Considine, and all persons and officers referred to therein. That he has read the foregoing answer and return to said petition and order to show cause and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief and as to those matters he believes it to be true.

HARVEY A. DELINE.

Subscribed and sworn to before me this 27th day of September, 1920.

[Seal]

LYLE S. MORRIS,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Sep. 27, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8517.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,

Defendant.

Return to Petition and Order to Show Cause.

Comes now Harvey A. Delign, and for himself and for John L. Considine, and all persons and officers referred to in defendant's petition, bill of particulars and the order to show cause herein, for return of certain whiskey and brandy to defendant alleged in said petition to belong to defendant, and for answer and return to said petition and order to show cause respectively, denies and alleges as follows, to wit:

I.

Denies that on the 20th day of June, 1920, or at any time whatever, Harvey A. Delign, John L. Considine, or any person or officer referred to in defendant's petition, bill of particulars or the order to show cause herein, either jointly, severally or at all seized the or any whiskey or brandy belonging to the defendant or seized any whiskey or brandy at all.

II.

Denies that the said property, or any part thereof,

alleged, to have been seized is now or ever was in the possession of any of the persons or officers here answering or for whom answer is made.

III.

Denies that the said property is now or ever has been retained [19] by Harvey A. Delign, John L. Considine, or any person or officer known to said Harvey A. Delign, John L. Considine, or either of them.

IV.

Denies that the Government, plaintiff, or any person, proposes or intends to use the said whiskey or brandy, or any part thereof, against the said defendant at the or any trial instituted by plaintiff herein against said defendant, or at the or any trial or proceeding whatever.

V.

Denies that the said Harvey A. Delign, John L. Considine, or either of them, or any of the persons or officers referred to in defendant's petition, bill of particulars or the order to show cause herein, on the 20th day of June, 1920, or at any time or ever or at all seized or caused to be seized from the *bona fide* and lawful or *bona fide* or lawful or any domicile of defendant the said whiskey and brandy or whiskey or brandy or any whiskey or brandy whatever.

For a further and separate answer and return to said petition and order to show cause allege the facts to be:

1.

That at all of the times herein mentioned Harvey A. Delign was, ever since has been and now is a mem-

ber of the police force of the City and County of San Francisco, California, to wit, a police officer and at all times herein mentioned acted as such officer.

2.

That on the 20th day of June, 1920, at the hour of 1:30 o'clock A. M. of said day, Harvey A. Delign, as such officer, received a telephone call from the Summerville Apartments, located at 457 Ellis Street, City and County of San Francisco, California, informing him that the peace and quiet of the occupants of said apartments were being disturbed by loud and boisterous noises made by persons [20] in rooms 3-4 and 5 of said apartments, and that intoxicating liquors were then and there being sold unlawfully in said rooms. That in response to said call and information said Harvey A. Delign, accompanied by other police officers of the said city and county, immediately went to rooms 3-4 and 5 of said Apartments and found the door to said rooms wide open, and in plain view saw bottles of intoxicating liquor and numerous glasses for serving intoxicating liquors, and then and there heard loud and boisterous noises being made by occupants of said rooms, and thereupon said Harvey A. Delign, and said other officers entered *entered* said rooms and found therein five men and three women, one of which said men was defendant herein and each and all of said men and women were then and there under the influence of intoxicating liquor to the extent of being drunk, noisy and boisterous, disturbing the peace and quiet of the occupants of said Summerville Apartments. That then and there in said rooms, and in plain view

of said Harvey A. Delign, and said other officers there were numerous bottles and three (3) kegs containing sherry and port wine containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes. That the said defendant then and there and in the presence of said Harvey A. Delign, and the said other officers furnished and delivered to four (4) of said five men and to said three women a part of the said wine and the same was then and there by said men and women drunk. That the said defendant then and there said to Harvey A. Delign and to said other officers that he was selling said wine. That two of the said men to whom said defendant furnished and delivered the said wine then and there and in the presence of defendant said to said Harvey A. Deline, and said other officers, that they paid to defendant twenty-five cents per drink for said wine. That defendant then and there stated to [21] Harvey A. Deligne, that he resided in room 214, of the Adair Hotel located at 445 Ellis Street, in the said City and County of San Francisco, and that he had no permit of any kind to move any of said wine from said hotel to said Summerville Apartments. That thereupon said Harvey A. Deligne arrested said defendant and then and there, and at the time of the said arrest, took into his possession, of said wine ten full bottles, one keg full and two partly filled kegs, and of the said bottles some of them contained sherry and some contained port wine, and of the said kegs some contained sherry and some port wine, and all of said wine then and there contained one-half of one per cent and more of

alcohol by volume, and was then and there fit for use for beverage purposes, and was then and there in the possession of the defendant and intended by him for use and was then and there being used in violation of Title II of the Act of October 28th, 1919, and known as the "National Prohibition Act." That the said defendant, as hereinbefore set out, then and there stated to said Harvey A. Deligne, that he, said defendants, residence was then at 445 Ellis Street, in the said City and County of San Francisco, and upon information thereafter received from the clerk of the hotel located at 445 Ellis Street, that said defendant on the said 20th day of June, 1920, resided at said hotel, the said Harvey A. Deligne has reason to believe, and does believe, and upon such information and belief alleges the fact to be, that said defendant's residence on the said 20th day of June, 1920, was at and in the Hotel Adair, 445 Ellis Street, and that defendant on said 20th day of June, 1920, had no *bona fide* or lawful residence in said Summerville Apartments, nor at 457 Ellis Street, in said City and County of San Francisco, California. That John L. Considine, as District Prohibition Officer, or otherwise, [22] has not, nor has any official of the plaintiff herein, ever seized, had in his possession or retained any of the said wine.

WHEREFORE the said Harvey A. Deligne, John L. Considine, and all the other officers referred to and mentioned in said petition and order to show cause herein prays, that the said petition be dis-

missed and that the prayer for the return of the property be denied.

HARVEY A. DELINE.

FRANK M. SILVA,

United States Attorney.

BEN F. GEIS,

Asst. United States Attorney,

Attys. for Plaintiff. [23]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Harvey A. Delign, being first duly sworn, deposes and says: That he is the Harvey A. Delign named and referred to in the petition and order to show cause in the above and within entitled action. That he makes the above answer and return, to defendant's petition, bill of particulars and the order to show cause herein, for himself, John L. Considine and all persons and officers referred to in said petition, bill of particulars and order to show cause. That he has read the foregoing answer and returns and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes them to be true.

HARVEY A. DELINE.

Subscribed and sworn to before me this 27th day of September, A. D. 1920.

[Seal]

LYLE S. MORRIS,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Sep. 27, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [24]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the court-room thereof, in the City and County of San Francisco, on Monday, the 27th day of September, in the year of our Lord one thousand nine hundred and twenty. Present: the Honorable MAURICE T. DOOLING, Judge.

No. 8517.

UNITED STATES OF AMERICA

vs.

BINGER STEWART HERINE.

Minutes of Court—September 27, 1920—Order Dismissing Order to Show Cause as to Return of Personal Property, and Minutes of Trial.

This case came on regularly this day for the trial of said defendant and for hearing on order to show cause and petition for return of certain property taken from the defendant herein. Said defendant was present in court with attorney, C. F. Tramutolo, Esq. B. F. Geis, Esq., Asst. U. S. Atty., was present on behalf of the United States, and presented and filed two returns to said petition and order to show cause, and after hearing Mr. Geis and Mr. Tramutolo, the Court ordered that said order to show cause be dismissed and said petition denied.

After hearing said attorneys, the Court ordered that the trial of this case proceed and that the jury-box be filled from the regular panel of trial jurors of this court. Accordingly, the hereinafter named persons were duly drawn by lot, sworn and examined etc., as follows:

M. H. Falkenstein, C. S. Falk, C. H. Adams, Louis B. Gorgers, and Edwin R. Jackson accepted; E. H. O'Brien, ordered excused; John C. Bateman, John C. Dornin, A. W. Dollars, W. E. Holcomb, accepted; Mark E. Fontana, ordered excused; C. J. Wood, accepted; Fred C. Gerdes, peremptorily challenged by the United States and ordered excused; Andrew Armstrong and Henry J. Diehl, accepted. [25] Thereupon twelve (12) persons having been accepted as jurors to try said defendant, were accordingly sworn, viz.:

M. H. Falkenstein,	John C. Dorrin,
C. F. Falk,	A. W. Dollard,
C. H. Adams,	W. E. Holcomb,
Louis B. Gorgers,	C. J. Wood,
Edwin R. Jackhon,	Andrew Armstrong,
John C. Bateman,	Henry J. Diehl.

On motion of Mr. Tramutolo, the Court ordered that all persons to be called as witnesses herein be excluded from the courtroom during introduction of evidence. Mr. Geis made statement to the Court and jury of the nature of the case and called H. A. Delign, George J. Ohnimus, Joseph Brouders, Peter MacIntyre, T. Griffith, W. A. Howard and Charles J. Ward, each of whom was duly sworn and examined on behalf of the United States, and introduced in

evidence certain bottles and contents, etc., which were filed and marked United States Exhibit No. 1, and thereupon rested case of the United States.

Mr. Tramutolo thereupon moved the Court for an order instructing the jury herein to return a verdict of Not Guilty, which motion the Court ordered denied, and to which order Mr. Tramutolo entered an exception, and called the defendant, Binger Stewart Herine, who was duly sworn and examined in his own behalf. Mr. Geis recalled in rebuttal George J. Ohnimus and H. A. Delign, and thereupon rested the case of the United States.

The case was then submitted without argument on behalf of either party; whereupon the Court proceeded to instruct the jury herein, who after being so instructed retired at 12:05 o'clock P. M., to deliberate upon a verdict and subsequently returned into Court at 12:15 o'clock P. M., and upon being called, all twelve (12) jurors answered to their names, and in answer to question of Court stated that they had agreed upon a verdict, and presented a written verdict, which the Court ordered filed and recorded, viz.: "We the jury, find [26] Binger Stewart Herine, the defendant at the bar, Guilty on Count No. 1; Not Guilty on Counts No. 2 and 3. Arthur W. Dollard, Foreman." Whereupon the Court ordered that the jurors herein be discharged from further consideration of this case, and excused from attendance upon the Court until September 28, 1920, at 10 o'clock A. M. After hearing the respective attorneys, the Court ordered that this case be con-

tinued to October 2, 1920, for pronouncing of judgment. [27]

In the District Court of the United States in and
for the Northern District of California, First
Division.

No. 8517.

THE UNITED STATES OF AMERICA

vs.

BINGER STEWART HERINE.

(Verdict.)

We, the Jury, find Binger Stewart Herine, the
defendant at the bar, Guilty on Count No. 1; Not
Guilty on Counts Nos. 2 and 3.

ARTHUR W. DOLLARD,

Foreman.

[Endorsed]: Filed Sept. 27, 1920, at 12 o'clock
and 15 minutes P. M. W. B. Maling, Clerk. By
Lyle S. Morris, Deputy Clerk. [28]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8517.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,

Defendant.

Engrossed Bill of Exceptions.

BE IT REMEMBERED, that on the 23d day of September, 1920, in the above-entitled cause, the defendant in said cause filed therein and presented to the Honorable M. T. Dooling, Judge of the above-entitled court, his certain petition for the return of personal property, which said petition is in the words and figures following, to wit:

(Title of Court and Cause.)

PETITION FOR THE RETURN OF PERSONAL PROPERTY.

Comes now the above-named defendant and alleges:

I.

That he is a citizen of the United States of America, and a resident of the City and County of San Francisco, State of California.

II.

That prior to January 16th, 1920, and at all times

hereinafter mentioned, said defendant was the owner of an assortment of liquors and beverages, to wit, sherry and port, which said liquors and beverages were and are the lawful and *bona fide* property of said defendant and were lawfully in his possession at the time of their seizure by Harvey De Ligne, a patrolman of the Police Department of [29] the City and County of San Francisco, State of California.

III.

That the said liquors and beverages, to wit, sherry and port, were seized by Harvey A. Deligne, a patrolman of the Police Department of the City and County of San Francisco, State of California, on or about the twentieth day of June, 1920, and that the said property is now retained by Harvey A. Deligne and John L. Considine, District Prohibition Enforcement Officer. That the seizure by the above-named officers from the said defendant was in violation of the fourth and fifth amendments to the Constitution of the United States.

IV.

That the Government proposes to use the said above-mentioned seized property, so seized by the above-named officers, against this defendant at the time of his trial, proceedings for which have been instituted charging said defendant with violating the Act of October 28th, 1919, commonly known as the National Prohibition Act, unless this Court orders the return of said property so unlawfully seized.

WHEREFORE, defendant prays that the said above-named Harvey A. De Ligne and John L. Considine, and each of them and all other officers responsible for the seizure and retention of said hereinabove described property be notified, and that the above-entitled court direct and order said above-mentioned officers and any and all other officers responsible for the seizure and retention of said hereinabove described property, to show cause why said property should not be returned to said defendant.

BINGER STEWART HORINE,

Petitioner for Defendant.

CHAUNCEY F. TRAMUTOLO,

Attorney for Defendant. [30]

State of California,

City and County of San Francisco,—ss.

Binger Stewart Herine, also known as Binger Stewart Horine, being first duly sworn, deposes and says:

That he is the defendant named in the foregoing petition; that he has read the same and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

BINGER STEWART HORINE.

Subscribed and sworn to before me this 23 day of September, 1920.

[Seal]

GRACE CAMPBELL,

Notary Public in and for the City and County of San Francisco, State of California.

BE IT FURTHER REMEMBERED, that after reading and considering the said petition, the said Court, on the 23d day of September, 1920, duly gave, made and issued in said cause its certain order to show cause, which said order is in the words and figures following, to wit:

(Title of Court and Cause.)

ORDER TO SHOW CAUSE.

The above named defendant having filed herein his duly verified petition for the return of personal property, and good cause appearing therefor,

IT IS HEREBY ORDERED that John L. Considine, District Prohibition Enforcement Officer, and Harvey A. Deligne, a patrolman of the Police Department of the City and County of San Francisco, and each of them, and any and all other officers responsible for the seizure [31] and the retention of the property described in said petition, appear before this court at the courtroom thereof in the Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, at the hour of ten A. M. on the 25th day of September, 1920, or as soon thereafter as counsel can be heard, to then and there show cause, if any they have, why they should not be compelled to turn over and deliver the property seized and retained by them as aforesaid, to the said defendant.

Dated: The 23d day of September, 1920.

M. T. DOOLING,
Judge.

GOOD CAUSE APPEARING THEREFOR, the time for serving said order is hereby shortened so that the same may be served on or before the 23d day of September, 1920.

M. T. DOOLING,
Judge.

BE IT FURTHER REMEMBERED, that on the 25th day of September, 1920, pursuant to suggestion made by the Judge of said Court, the said defendant in support of the petition hereinabove set forth filed his certain bill of particulars, which was and is in the words and figures following, to wit:

(Title of Court and Cause.)

BILL OF PARTICULARS.

Comes now the above-named defendant and furnishes herewith his bill of particulars, and requests that the same be made part of his petition for the return of personal property filed in the above-entitled court on the twenty-third day of September, 1920; and asks that the property seized from him consisting of liquors and beverages, to wit, sherry and port, be returned to him for the following reasons: [32]

I.

That the said property was seized by Harvey A. De Ligne, a patrolman of the Police Department of the City and County of San Francisco, without any lawful authority whatsoever; that the said officer at the time of seizure of the property from defendant was not possessed with a warrant authorizing the seizure of said property.

II.

That the said Harvey A. De Ligne at the time of the arrest of the defendant did not have a warrant for such purpose.

III.

That the said Harvey A. De Ligne did not at the time of the seizure of the property have a search-warrant for said purpose.

IV.

That the property seized by said Harvey A. De Ligne at the time of its seizure, to wit, on the twentieth day of June, 1920, was seized from the *bona fide* and lawful domicile of defendant.

By reason of the foregoing facts defendant prays for the return of the personal property seized.

BINGER STEWART HORINE,
Defendant.

CHAUNCEY F. TRAMUTOLO,
Attorney for Defendant.

BE IT FURTHER REMEMBERED, that on the 27th day of September, 1920, the United States Attorney, on behalf of the plaintiff, filed in said Court his certain return to petition and order to show cause, which said return is in the words and figures following, to wit:

(Title of Court and Cause.)

RETURN TO PETITION AND ORDER TO
SHOW CAUSE.

Comes now Harvey A. Delign, and for himself and for John L. Considine, and all persons and officers referred to in defendants' petition, bill of

particulars and the order to show cause herein, [33] for the return of certain whiskey and brandy to defendant alleged in said petition to belong to defendant, and for answer and return to said petition and order to show cause respectively, denies and alleges as follows to wit:

I.

Denies that on the 20th day of June, 1920, or at any time whatever, Harvey A. Delign, John L. Considine, or any person or officer referred to in defendant's petition, bill of particulars or the order to show cause herein, either jointly, severally or at all, seized the or any whiskey or brandy belonging to the defendant or seized any whiskey or brandy at all.

II.

Denies that the said property, or any part thereof, alleged to have been seized is now or ever was in the possession of any of the persons or officers here answering or for whom answer is made.

III.

Denies that the said property is now or ever has been retained by Harvey A. Delign, John L. Considine, or any person or officer known to said Harvey A. Delign, John L. Considine, or either of them.

IV.

Denies that the Government, plaintiff, or any person, proposes or intends to use the said whiskey or brandy, or any part thereof, against the said defendant at the or any trial instituted by plaintiff herein against said defendant, or at the or any trial or proceeding whatever.

V.

Denies that the said Harvey A. Delign, John L. Considine, or either of them or any of the persons or officers referred to in defendant's petition, bill of particulars or the order to show cause herein, on the 20th day of June, 1920, or at any time or ever or at all seized or caused to be seized from the *bona fide* and lawful or *bona fide* or lawful or any domicile of the defendant the said whiskey [34] and brandy or whiskey or brandy or any whiskey or brandy whatever.

For a further and separate answer and return to said petition and order to show cause allege the facts to be:

1.

That at all of the times herein mentioned Harvey A. Delign was, ever since has been and now is a member of the police force of the City and County of San Francisco, California, to wit, a police officer, and at all times herein mentioned acted as such officer.

2.

That on the 20th day of June, 1920, at the hour of 1:30 o'clock A. M., of said day, Harvey A. Delign, as such officer, received a telephone call from the Summerville Apartments, located at 457 Ellis Street, City and County of San Francisco, California, informing him that the peace and quiet of the occupants of said apartments were being disturbed by loud and boisterous noises made by persons in rooms 3-4 and 5 of said apartments, and that intoxicating liquors were then and there being sold

unlawfully in said rooms. That in response to said call and information said Harvey A. Delign, accompanied by other police officers of the said city and county immediately went to rooms 3-4 and 5, of said apartments, and found the door to said rooms wide open, and in plain view saw bottles of intoxicating liquor and numerous glasses for serving intoxicating liquors, and then and there heard loud and boisterous noises being made by occupants of said rooms, and thereupon said Harvey A. Delign, and said other officers entered *entered* said rooms and found therein five men and three women, one of which said men was defendant herein, and each and all of said men and women were then and there under the influence of intoxicating liquor to the extent of being drunk, noisy and boisterous, disturbing the peace and quiet of the occupants of said Summerville Apartments. That then and there in said rooms and in plain view of said Harvey A. Delign and said [35] other officers there were numerous bottles and three (3) kegs containing sherry and port wine containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes. That the said defendant then and there and in the presence of said Harvey A. Delign and the said other officers furnished and delivered to four (4) of said men and to said three women a part of the said wine and the same was then and there by said men and women drunk. That the said defendant then and there said to Harvey A. Delign and to said other officers that he was selling said wine. That two of the said men to

whom said defendant furnished and delivered the said wine then and there and in the presence of defendant said to said Harvey A. Deline, and said other officers, that they paid to defendant twenty-five cents per drink for said wine. That defendant then and there stated to Harvey A. Deligne, that he resided in room 214 of the Adair Hotel, located at 445 Ellis Street, in the said City and County of San Francisco, and that he had no permit of any kind to move any of said wine from said hotel to said Summerville Apartments. That thereupon said Harvey A. Deligne arrested said defendant and then and there, and at the time of said arrest, took into his possession, of said wine, ten full bottles, one keg full and two partly filled kegs, and of the said bottles some of them contained sherry and some contained port wine, and of the said kegs some contained sherry and some port wine and all of said wine then and there contained one-half of one per cent and more of alcohol by volume, and was then and there in the possession of the defendant and intended by him for use, and was then and there being used in violation of Title II of the Act of October 28th, 1919, and known as the "National Prohibition Act." [36]

That the said defendant, as hereinbefore set out, then and there stated to said Harvey A. Deligne that he, said defendant's, residence was then at 445 Ellis Street, in the said City and County of San Francisco, and upon information thereafter received from the clerk of the hotel located at 445 Ellis Street, that said defendant on the said 20th day of

June, 1920, resided at said hotel, the said Harvey A. Deligne has reason to believe and does believe, and upon such information and belief alleges the fact to be, that said defendant's residence on the said 20th day of June, 1920, was at and in the Hotel Adair, 445 Ellis Street, and that defendant on said 20th day of June, 1920, had no *bona fide* or lawful residence in said Summerville Apartments, nor at 457 Ellis Street in said City and County of San Francisco, California.

That John L. Considine, as District Prohibition Officer, or otherwise, has not, nor has any official of the plaintiff herein ever seized, had in his possession or retained any of the said wine.

WHEREFORE, the said Harvey A. Deligne, John L. Considine, and all the other officers referred to and mentioned in said petition and order to show cause herein, pray, that the said petition be dismissed and that the prayer for the return of the property be denied.

HARVEY A. DELIGNE.

FRANK M. SILVA,

United States Attorney.

BEN F. GEIS,

Asst. United States Attorney,

Attys. for Plaintiff. [37]

United States of America,

Northern District of California,

City and County of San Francisco,—ss.

Harvey A. Delign, being first duly sworn, deposes and says: That he is the Harvey A. Delign named and referred to in the petition and order to show

cause in the above and within entitled action. That he makes the above answer and return to defendant's petition, bill of particulars and the order to show cause herein for himself, John L. Considine, and all persons and officers referred to in said petition, bill of particulars and order to show cause. That he has read the foregoing answer and return and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on *his own knowledge, except as to those matters therein stated on* information and belief, and as to those matters he believes them to be true.

HARVEY A. DELINE.

Subscribed and sworn to before me this 27th day of September, A. D. 1920.

[Seal]

LYLE S. MORRIS,

Deputy Clerk U. S. District Court, Northern District of California. [38]

AND BE IT FURTHER REMEMBERED, that on the said 27th day of September, 1920, the said petition came on regularly to be heard before Honorable M. T. Dooling, Judge, of the above-entitled court, and upon said hearing the said defendant, by his counsel, presented and read the said petition and bill of particulars, and said petition and bill of particulars were introduced in evidence in support of said petition and the foregoing return was introduced in evidence by and on behalf of plaintiff, and the said petition and the matters and things set forth therein and in the said return were argued by counsel; in

consideration whereof it was ordered by the Court that said petition for the return of said personal property be denied; to which said ruling of the Court counsel for the defendant then and there duly excepted and said exception was by the Court duly allowed.

BE IT FURTHER REMEMBERED, that on the 27th day of September, 1920, the above-entitled cause came on regularly to trial before the said Court, Honorable M. T. Dooling, Judge thereof, and a jury having been duly empaneled and sworn, to try the said cause, the following proceedings were had and taken:

**Testimony of Harvey A. Deligne, for the
Government.**

HARVEY A. DELIGNE, called as a witness on behalf of the United States, and having been first duly sworn, testified as follows:

I am a police officer of the city and county of San Francisco and have been such around seven years. I know the defendant, Mr. Herine, who sits back of Mr. Tramutolo. I saw him on the 20th of June, of this year, at 457 Ellis Street, a place known as the Summerville Apartments. I have some notes here that I made at the time. In response to a telephone call to the central police station, Officers Brouders, Ohnimus, McKeon and myself went to the Summerville Apartments. We went to rooms 3, 4 and 5 of the apartments, on the first floor. When I reached the apartment the door was open and I could see from the outside numerous

(Testimony of Harvey A. Deligne.)

bottles setting [39] around on the sink and table, glasses, etc. There was loud laughter and talking. There were three men and two women in room 5 and there were two men and one woman in room 3. There were several kegs, one full, and two partly full, and two or three were empty. There were ten bottles full altogether, full of port and sherry wine. I asked who was the owner of these apartments, and Mr. Herine stepped forward and said that he was. He stated that he had been manager of the Cadillac Barr at Eddy and Leavenworth Streets for seven years, that was a saloon and he stated, "I am still in the business, and not in it for my health; you men can see what I am doing; no use trying to fool you people." He was dispensing this wine to the persons present; he served wine on a tray in glasses to the party in room 3, two men and a woman. That was in my presence. Two of the persons present made the statement that they had paid 25 cents a drink; we called Mr. Herine out to hear this statement; it was made in his presence; he admitted it. I tasted some of the wine that had been served and I know wine when I taste it. The wine that I tasted was sherry. I believe it contained more than one-half of one per cent of alcohol. The people that were there were certainly intoxicated. I know that it contained more than one-half of one per cent of alcohol and that it was fit for use for beverage purposes. The wine we took in the patrol-wagon to the City Prison, where it was placed with the property clerk to be held as evidence. The identification tag was

(Testimony of Harvey A. Deligne.)

placed on them at police headquarters. They are in the same condition now, as far as I know, as when they were delivered there.

Thereupon the said kegs and bottles were offered for identification and marked "U. S. Exhibit 1 for Identification."

On cross-examination the said witness testified as following:

I went to this apartment about 1:30 A. M. on June 20th. The telephone call received by the central station was delivered to me [40] by Sergeant Duffy. The doors to the apartment were open, I mean by that that it was open, standing open so that I could look in there from the hall. The people who were in there drinking were not in room 4; they were in room 5, Mr. Herine was in room 5. I did not see Mr. Herine take any money from any of these people in room 5. One round of liquors was dispensed after I was there, in my presence. The round of drinks was dispensed in room 3; Mr. Herine got the liquor from room 4 and brought it into room 3; that was after I had gotten there with the other officers. I did not mark these various kegs. There was a bed in room 3 and a coat and vest that Mr. Herine did not have on was hanging there at the time.

On redirect examination the said witness testified:

The defendant stated to me that he lived at the Adair Hotel, 445 Ellis Street, room 214.

**Testimony of George J. Ohnimus, for the
Government.**

GEORGE J. OHNIMUS, witness called on behalf of the United States, after being first duly sworn, testified as follows:

I am and have been a number of years a police officer of the city and county of San Francisco. On the 20th day of June of this year I was in company with Mr. Deline on a trip to the Summerville Apartments at about 1:30 in the morning. We went to rooms 3, 4 and 5; two of the doors of these rooms, to my knowledge, were open; we could see right in from the hall. We saw there was a sink in there containing a tray with glasses on, some full, some partly full. The drain-board contained several bottles, some full, some partly full and a few kegs. There were five men and three women present in rooms 3, 4 and 5. In one room there was a bed and a bureau and chair, and there was a woman sitting on a man's lap there, and they had two or three glasses on a tray on the bureau. There was a tray brought into this room where the two men and one woman was. I asked the defendant what he was doing [41] there and he stated, "There is no necessity of lying; I will come clean; I am selling this stuff." I asked him if he had lived at that place; he said no, that he lived in another apartment there, in a house adjoining there; I believe it was the Adair Hotel. There were two men in company with one woman, a man by the name of Griffin, and a man by the name of Richards, and they said

(Testimony of George J. Ohnimus.)

that they had bought liquor in there at 25 cents a drink from the defendant. These kegs that are here and the bottles of wine were carried to the patrol-wagon and taken down to the property clerk. I did not go down with them. Police Officer Deline went down with them. I did not see them down in the property clerk's office afterwards.

On cross-examination the said witness testified as follows:

I met officer Deline; on Ellis and Taylor Streets, I believe. When we appeared at the Summerville Apartments two of the doors were open; I believe 3 and 4 were the rooms that were open. I did not see any money pass while I was there. The liquor was brought from room 4 into room 3, I believe. It must have been about half-past twelve, or a quarter to one when we entered the place.

On redirect examination the said witness testified over the objection of counsel for the defendant:

All of the occupants, when I went in, seemed to be intoxicated.

On recross-examination the said witness testified:

I did not say that the defendant was intoxicated; he had been drinking. I would not say all of the rest were intoxicated, some of them seemed to be worse than others. The woman seemed to be in the worst condition.

Testimony of Joseph Brouders, for the Government.

JOSEPH BROUDERS, called as a witness on behalf of the United States, being first duly sworn, testified :

I am a police officer of the city and county of San Francisco and have been such for four years past. On the 20th of June of this year I accompanied Officers Deline and Ohnimus down to Ellis [42] Street, to a place known as the Summerville Apartments. I went into the hotel and down to the end of the hall into rooms 3, 4 and 5. In room 3 there were two men and one woman, and in a room off of the kitchen, I believe, there were two women and three men, making five men and three women in all. (To the Court.) There were five men exclusive of the defendant. In room three there were some glasses sitting on the table, and in the room off the kitchen there were glasses, and in the kitchen there were numerous bottles of wine, port and sherry, and glasses, and two small kegs, I believe, were in the closet. They were of the same class as those kegs standing on the floor here. There were some bottles of wine there too. I believe there were three drinks on a tray that were taken into room 3—I believe that he took them into room 3. It went into that room; who he gave it to, I don't know. I was not in the room. The defendant said, "You police people have got me; there is no use," some words to that effect. He said, "I have been in the saloon business over in the Cadillac Bar there for five or six years, and still in the business." One of the

(Testimony of Joseph Brouders.)

parties in room 3 said he paid 25 cents for the wine; that was not in the presence of the defendant. All of the men and women had been drinking; some showed it possibly a little more than the others. The defendant said he lived in the Adair Hotel; that is a few doors down from the Summerville. I put the bottles in the suitcase, or in the two suitcases, and we took them out and put them in the patrol wagon.

On cross-examination the said witness testified as follows:

I did not accompany these articles to the City Prison, I believe Mr. Deline went. He was ordered by Corporal McIntyre to go down. The first I saw of the defendant he was in the kitchen. Rooms 4 and 5 are in a sort of a little hallway, a hallway about 10 or 12 feet long; the hallway leads south. Room 3 is at the [43] south end; the other apartments are to the left; the kitchen is straight back at the end of the hall going in; the hallway I would judge to be about 10 or 12 feet. The door leading to rooms 4 and 5 was open. There is only one room to the right. The first room is 3, the next one is 4, and then 5. You would walk into the kitchen just the same as I would walk in here, and the kitchen is straight ahead; the room is just to the right of that. This door that was out by the hall that leads into rooms 4 and 5 was open so that I could look in. The door to room 3 was not open. I think Officer Deline was the man that had the door opened, and we walked in. I think he knocked on the door, first. I saw the de-

(Testimony of Joseph Brouders.)

defendant take a tray of drinks, a tray with three glasses on it, to room 3. We announced ourselves as officers. He still went on and served the drinks. The defendant had been drinking, but he was able to attend to his business. I think Officer Deline had a drink.

Testimony of Peter McIntyre, for the Government

PETER MCINTYRE, called as a witness for the United States and having been first duly sworn, testified:

I am a corporal of the police department and have been with the police department of San Francisco for over 17 years. I arrived at the Summerville Apartments on the morning of June 20, 1920, some time after the other officers had arrived. I went to rooms 3, 4 and 5 of that apartment. There were kegs that they had gathered into one room when I got there, and bottles. I think there were five men and two ladies present. There were bottles apparently of liquor in sight. I did not sample any of it. This liquor was sent to the City Prison, under my direction, to be checked up. I never saw it afterwards. The Summerville Apartments is 457 Ellis Street, between Jones and Taylor Streets on the south side. [44]

On cross-examination the said witness testified:

I did not accompany these things to the City Prison; I know Mr. Deline left the scene in the patrol-wagon; I saw him get into the patrol-wagon and go down with the property which is here before me.

Testimony of Tim Griffin, for the Government.

TIM GRIFFIN, called as a witness for the United States and having been first duly sworn, testified:

I am acquainted with the defendant Mr. Herine. I was at the Summerville Apartments on the evening of June 19th and the morning of June 20th when the officers came there. I first went to the apartments about eight o'clock in the evening of June 19th. I got some wine there from Binger Herine, the gentlemen sitting there. I really don't know, I can't remember what I paid for my drinks of wine. My best recollection is 25¢ per drink. The liquor was served to me by the defendant Herine; that liquor was sherry wine; that is what I asked for. A fellow by the name of Richards was with me. I guess he also drank some wine while I was present; I don't know whether he bought any or not. I did not see any women there that evening except the lady Richards had with him. He and I were together in one room with her. I did not drink any wine after the officers came. I could not tell you the number of the room I was in; it was right straight from the hall as you go in.

On cross-examination this witness testified:

I would not be certain that I paid this defendant for the sherry that I bought there; sometimes you neglect paying for it. I paid for some of it; I think I paid this defendant. (To the Court.) I paid the defendant, yes. I don't know how many drinks I had there that night. I paid for more than one; I guess it was around one o'clock in the morning that

(Testimony of Tim Griffin.)

the officers came. I didn't have any drinks after the officers arrived. I guess I was intoxicated. I don't know if the other members of the party were any worse than [45] I was. (In response to a question by the Court.) I have known Mr. Herine two or three weeks. I didn't know him when he was tending bar at the Cadillac. I was first invited up to this room by a fellow and Mr. Herine invited me to come back. When I first went up there in the evening I was sober and all of the whiskey or all of the liquor I drank was drank up there.

Testimony of W. A. Howard, for the Government.

W. A. HOWARD, called as a witness for the United States and having been first duly sworn, testified:

I am manager of the Adair Apartments. I know Mr. Herine, the defendant. He was there when I went in on February 15, 1919; he occupied room 214. The number of the Adair is 445 Ellis Street. He has remained there as a guest at my hotel since that time and is yet.

On cross-examination this witness testified:

Yes, the defendant had a man named Pancost with him; he always had other gentlemen with him from time to time. No, he did not actually leave my place during the month of June; he took another apartment; he took another apartment at the Summer-ville, but he did not give up his tenancy with me. He never left my place and was responsible for the

(Testimony of W. A. Howard.)

rent. Mr. Pancost was a guest of Mr. Herine's. The defendant could not have left my place without my knowledge.

Testimony of Charles J. Ward, for the Government.

CHARLES J. WARD, called as a witness for the United States and having been first duly sworn, testified:

I am a corporal of police. I work in the property clerk's office. On the morning of June 20th I received certain kegs and bottles which were brought in. It was placed in the property clerk's office, checked up, and then placed in the vault. It remained there, so far as I know, until this morning. So far as I know it is in the same condition as it was when it was brought in there. [46]

**Testimony of Harvey A. Deline, for the Government
(Recalled).**

HARVEY A. DELINE, recalled for the United States as a witness, testified:

On thinking over the question I recall that I went up with the liquor down to the City Prison, when I stated before that I did not think I had I was not quite sure. I know that I was to the City Prison when we took a check of it, but I remember now going down on the patrol-wagon and assisting in checking it up.

Here the following occurred:

“The COURT.—Might I inquire if this is the

(Testimony of Binger S. Herine.)

same liquor you are asking to be returned, in this court?

Mr. TRAMUTOLO.—Yes.

The COURT.—Do you question its alcoholic content?

Mr. TRAMUTOLO.—No, we are not questioning it.

Mr. GEIS.—Probably we might shorten this if counsel will admit it contains one-half of one per cent of alcohol or more.

Mr. TRAMUTOLO.—Yes, I will.

Mr. GEIS.—That is all; we offer it in evidence, and with that we rest.

Testimony of Binger S. Herine, on His Own Behalf.

BINGER S. HERINE, the defendant, called as a witness on his own behalf, being duly sworn, testified:

I am the defendant in this case. I was living at the Adair Apartments with Mr. Pancost, and contemplated getting married, and was looking for other quarters, and I moved into the Summerville Apartments, and was giving a party at the Summerville Apartments, when this trouble came up and I was arrested.

At this point counsel for the defendant moved the Court to direct the jury to acquit the defendant, which said motion the Court then and there denied to which ruling of the Court counsel for the defendant duly reserved an exception herein. [47]

The witness continued: I heard the testimony of

(Testimony of Binger S. Herine.)

Mr. Griffin. I did not sell any liquor that night to Griffin or to anyone else. I gave the stuff away, the port and sherry; I was having a party. I got all of this stuff from the Cadillac Bar when I closed the bar up; when this law went into effect, I removed that from the saloon to my apartments, and filed papers with the Government—I filed papers to that effect with the Government, that I removed the stock that I had in that saloon to my apartments. I moved the stuff to room 214 in the Adair Hotel.

The COURT.—Q. How did you get it over to the other place. A. I took it over there.

Q. Did you have a permit to do so?

A. No, I did not have a permit. But this was some of the stock I had when I closed up; the people there that night were friends of mine; Mr. and Mrs. Black, and another lady, Mrs. Herine, and Mr. Richards, and his friends here, who was on the stand a minute ago, who I met only a short time before that, through Mr. Richards. I did not take any money that night, from him or anyone else. I did not remain at the Summerville Apartments after my arrest because I got married at that time and my wife did not want to go through the humiliation of living at that place, and we went back to the Adair Hotel. Mr. Pancost was called out of town on another job and I took the apartment back. Mr. Pancost lived at the Adair Hotel about four months. After this affair I moved back to the Adair. I was in the Summerville at the

(Testimony of Binger S. Herine.)

time I was arrested; my clothing was in there, and I was living there absolutely bona fide at that time. I did not make the statement testified to by the officers, or any statement that I was still in the game selling; I would have to be intoxicated to say anything of that sort if I was doing wrong. I am 28 years old. I have never been arrested in my life. I have been married two and one-half months, upon the 23d [48] of last month it was two months. I have known Mr. Black and his wife, I guess, for six years. Mrs. Herine was one of the parties in there. There was Griffin and Richards and some lady that I met; I never met the lady before; I was introduced to her. Rooms 3, 4 and 5 were rented by me as my apartment and paid for by me. I did not make any such statement, that I would come through clean, and that I was still selling this stuff. I moved to the Summerville Apartments in June, the first part of June.

On cross-examination the witness testified:

I rented this apartment at the Summerville the first part of June and was living there and had something to eat, and clothes. I did not cook very much; I was living mostly at the restaurants at that time. I had not been married yet. I intended to be married that week. My clothing was over there, consisting of a complete outfit that belonged to me. It was in apartment number 3 in the closet; it was there after I was released from jail.

Testimony of George J. Ohnimus, for the Government (Recalled in Rebuttal).

GEORGE J. OHNIMUS, being called for the United States in rebuttal, testified:

I made a search of the closets; I believe in room 5 there were one or two shirts, working shirts, blue shirts. There was nothing in room 3 with the exception of a tray and two glasses on the bureau, nothing in the drawers. I did not see any edibles of any kind, nothing outside of liquor.

Testimony of Harvey A. Deline, for the Government (Recalled in Rebuttal).

HARVEY A. DELINE, recalled for the United States in rebuttal, testified:

On the morning of June 20th I *search* carefully rooms 3, and 4 5 of the Summerville Apartments; there were no shoes, clothing, such as a suit of clothing, or anything that would indicate that a man lived there. There was a coat and vest hanging up in the closet in room 3; the defendant was in his shirt sleeves. All I [49] saw in there was one coat. I did not observe any edibles; I searched every place carefully.

Thereupon counsel for both sides rested and the said cause was argued by counsel. Thereupon the Court delivered its charge to the jury. Thereafter the jury retired to deliberate and returned thereafter into court with the following verdict:

“We the Jury, find BINGER STEWART HERINE, the defendant at the bar, guilty on Count

No. 1. Not guilty on Counts Nos. 2 and 3.”

ARTHUR W. DOLLARD,

Foreman.

Thereafter and on the second day of October, the day fixed by the Court for the pronouncement of judgment, the defendant was called to the bar of the Court and asked to show cause, if any he had, why the judgment of the law and the sentence of the Court should not be pronounced upon him.

Thereupon, Chauncey F. Tramutolo, Esq., counsel for the said defendant, presented to the Court a motion for a new trial and a motion in arrest of judgment, each of which said motions is on file and to which reference is hereby made. Each of the said motions was overruled by the Court, to which ruling counsel for the defendant then and there duly excepted, and the Court pronounced judgment as appears from the judgment-roll in said cause on file herein.

AND NOW, and within due legal time thereafter, the said defendant presents this his bill of exceptions and prays that the same be settled, approved and allowed and that the same may be used upon the writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, heretofore allowed in this cause.

CHAUNCEY F. TRAMUTOLO,

Attorney for said Defendant. [50]

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the re-

spective parties hereto that the foregoing proposed bill of exceptions may be approved, settled and allowed by the Judge of the above-entitled court as correct in all respects, and that the same shall be a part of the record herein and that the same may be made the bill of exceptions herein.

CHAUNCEY F. TRAMUTOLO,
Attorney for Defendant.

FRANK M. SILVA,
United States Attorney.

By ALBERT M. HARDIE,
Assistant U. S. Attorney.

Order Approving and Settling Bill of Exceptions.

To the end that the matters therein contained may be and remain of record, the foregoing bill of exceptions is hereby settled, approved and allowed, as being in all respects, full, true and correct herein.

Dated: This 22d day of December, 1920.

M. T. DOOLING,
District Judge.

Service by copy is hereby admitted this 15th day of December, 1920.

FRANK M. SILVA,
U. S. Attorney.

[Endorsed]: Copy of within proposed bill of exceptions hereby received Oct. 21, 1920.

FRANK M. SILVA,
U. S. Attorney.
ALBERT M. HARDIE,
Asst. U. S. Attorney.

Filed Dec. 22, 1920. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [51]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8517.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,

Defendant.

Motion for New Trial.

Now comes Binger Stewart Herine, also known as Binger Stewart Horine, and moves this Honorable Court that the verdict of the jury heretofore given, made and entered in the above-entitled cause, be vacated and set aside and a new trial be granted, and as and for his grounds of motion for a new trial specifies:

I.

That the said verdict is against the law.

II.

That the said verdict is against the evidence.

III.

That the evidence introduced upon the trial of the above-entitled cause was and is insufficient in law to support or justify the said verdict.

IV.

That this Honorable Court committed error to the manifest prejudice of defendant in denying a certain motion or petition made by and on behalf of this defendant, in which petition said defendant [52] prayed for an order of said Court directing and commanding the return to defendant of certain liquor previously taken unlawfully and without warrant from the possession and domicile of defendant, which said liquor is more particularly described as follows, to wit:

Ten (10) full quart bottles of sherry and port wine,
One (1) five gallon keg of sherry.

Two (2) Partly filled kegs of sherry.

One (1) suitcase containing empty glasses and bottles.

V.

That said Court committed error to the manifest prejudice of defendant in admitting in evidence over the objection of defendant, the property described in the foregoing paragraph of this motion.

WHEREFORE, defendant prays that said verdict be set aside and that a new trial of this cause be granted by this Honorable Court.

Dated: October 2d, 1920.

C. F. TRAMUTOLO,
Attorney for Defendant.

It is hereby ordered that the foregoing written motion may be filed herein as of the date of October 2d, 1920.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 14, 1920. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [53]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 8517.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,

Defendant.

Motion in Arrest of Judgment.

Now comes Binger Stewart Herine, also known as Binger Stewart Horine, the defendant in the above-entitled cause, and moves this Honorable Court to arrest the judgment herein, upon the following grounds, to wit:

1. That this Honorable Court had not and has not any jurisdiction to try the above-entitled cause, or to hear or determine the same or to pronounce judgment against this defendant.

2. That the information against this defendant on file herein does not charge this defendant with any crime or offense against the United States of America or with having violated any law or statute thereof, and that the count of said information upon which defendant was convicted, does not contain a

statement of any facts sufficient to charge this defendant with violating any provision of the so-called National Prohibition Act, or with any other offense against the United States of America or with maintaining a common nuisance within the meaning of said act, and particularly for the reason that said count of said information does not charge [54] or allege that said defendant kept the liquor referred to therein, on the premises therein mentioned, for beverage purposes, or for the purpose of sale or for any other unlawful purpose or for any purpose prohibited by the said National Prohibition Act.

Dated: This 2d day of October, 1920.

C. F. TRAMUTOLO,
Attorney for Defendant.

It is hereby ordered that the foregoing written motion may be filed herein as of the date of October 2d, 1920.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 14, 1920. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [55]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 2d day of October, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable MAURICE T. DOOLING, Judge.

No. 8517.

UNITED STATES OF AMERICA

vs.

BINGER STEWART HERINE.

Minutes of Court—October 2, 1920—Judgment, etc.

This case came on regularly this day for pronouncing of judgment upon said defendant, who was present with attorney C. F. Tramutolo, Esq. B. F. Geis, Esq., Asst. U. S. Atty., was present on behalf of the United States. Said defendant was called for judgment. Mr. Tramutolo moved the Court for new trial, which motion the Court ordered denied, and to which order an exception was entered. Mr. Tramutolo then moved the Court in arrest of judgment, which motion the Court ordered denied, and to which order exception was entered. After hearing Mr. Tramutolo, and no cause appearing why judgment should not be pronounced herein, the Court ordered that said defendant, for the offense of which he stands convicted, be imprisoned for the period of three (3) months in the County Jail, City and County of San Francisco, State of California, and that said defendant stand committed to the custody of the U. S. Marshal to execute said judgment, and that commitment issue accordingly. On motion of Mr. Tramutolo, the Court ordered that execution of said judgment be stayed for the period of one (1) week. [56]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 8517.

UNITED STATES OF AMERICA

vs.

BINGER STEWART HERINE.

Judgment on Verdict of Guilty as to Count No. 1.

Convicted Viol. National Prohibition Act.

Ben F. Geis, Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the Information filed on 22d day of June, 1920, charging him with the crime of Viol. National Prohibition Act, of his arraignment and plea of Not Guilty; of his trial and the verdict of the jury on the 27th day of September, 1920, to wit: "We, the Jury, find Binger Stewart Herine, the defendant at the bar, Guilty on Count No. 1; Not Guilty on Counts No. 2 and 3. Arthur W. Dollard, Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein, and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment, thereupon the Court rendered its judgment;

THAT, WHEREAS, the said Binger Stewart Herine having been duly convicted in this court of

the crime of violating the National Prohibition Act;

IT IS THEREFORE ORDERED AND ADJUDGED that the said Binger Stewart Herine be imprisoned for the period of three (3) months in the County Jail, County of San Francisco, State of California, as to the charges contained in Count No. 1 of the Information.

Judgment entered this 2d day of October, A. D. 1920.

WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

Entered in vol. 10 Judg. and Decrees at page 139.
[57]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 8517.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,
Defendant.

Petition for Writ of Error.

Now comes Binger Stewart Herine, also known as Binger Stewart Horine, and says that in the

record and proceedings in the above-entitled cause and also in the rendition of the verdict, judgment and sentence against him in said cause, manifest error hath happened to his grievous damage, all of which more fully appears from his assignment of errors filed with this petition, and that petitioner is aggrieved by the said verdict, judgment and sentence.

WHEREFORE, petitioner prays that a writ of error issue in his behalf in said cause out of the United States Circuit Court of Appeals for the 9th Circuit, and that a transcript of the record and proceedings in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

And petitioner further prays that during the pendency of said writ of error, all proceedings on said verdict, judgment and sentence be stayed and that your petitioner be admitted to bail.

Dated: This 2d day of October, 1920.

C. F. TRAMUTOLO,

Attorney for said Defendant and Petitioner.

[Endorsed]: Filed Oct. 14, 1920. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [58]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 8517.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,

Defendant.

Assignment of Errors.

Now comes the above-named defendant and with his petition for a writ of error herein files this his assignment of errors, and in that behalf alleges and shows:

1. That the said District Court had no jurisdiction over the above-entitled cause either to hear or determine the same or to render judgment or sentence therein against said defendant.

2. That the said District Court erred in denying the motion of this defendant for a new trial.

3. That the said District Court erred in denying the motion of this defendant in arrest of judgment.

4. That this Honorable Court committed error to the manifest prejudice of defendant in denying a certain motion or petition made by and on behalf of this defendant, in which petition said defendant prayed for an order of said Court directing and commanding the return to defendant of certain

liquor previously taken unlawfully and without warrant from the possession and domicile of defendant, which said liquor is more particularly described, as follows, to wit: [59]

Ten (10) full quart bottles of sherry and port wine.

One (1) five gallon keg of sherry.

Two (2) partly filled kegs of sherry.

One (1) suitcase containing empty glasses and bottles.

5. That said Court committed error to the manifest prejudice of defendant in admitting in evidence over the objection of defendant, the property described in the foregoing paragraph.

WHEREFORE, defendant prays that his petition for a writ of error be allowed and that the judgment heretofore given and made against him in and by the above-entitled court in this cause be reversed and that speedy justice be done to said defendant in that behalf.

C. F. TRAMUTOLO,
Attorney for Defendant.

[Endorsed]: Filed Oct. 14, 1920. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [60]

**Certificate of Clerk U. S. District Court to Trans-
script on Writ of Error.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing

60 pages, numbered from 1 to 60, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of The United States of America vs. Binger Stewart Herine, etc., No. 8517, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error (copy of which is embodied herein), and the instructions of the attorney for defendant and plaintiff in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of twenty-two dollars and forty-five cents (\$22.45), and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto are the original writ of error (page 62), return to writ of error (page 65) and original citation on writ of error (page 66).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 23d day of March, A. D. 1921.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,
Deputy Clerk. [61]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error (and Order Allowing Same).

United States of America,

Ninth Judicial Circuit,—ss.

The President of the United States of America to
the Judges of the Southern Division of the
United States District Court for the Northern
District of California, GREETING:

Because, in the record and proceedings as also in
the rendition of the judgment and sentence of a
plea which is in said District Court, before you or
some of you, between the United States of America,
plaintiff, and Binger Stewart Herine, *alias* Binger
Stewart Horine, defendant, manifest error hath hap-
pened to the great damage of said Binger Stewart
Herine, as is said and appears by his petition:

We, being willing that such error, if any hath
been, should be duly corrected and full and speedy
justice done to the parties aforesaid in this behalf,
do command you, if judgment be therein given, that
then, under your seal, distinctly and openly, you
send the record and proceedings aforesaid, with all
things concerning [62] the same, to the Judges

of the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court in the Post Office Building, in the City and County of San Francisco, State of California, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 13th day of November next, that the record and proceedings aforesaid being inspected, the said Judges of said Circuit Court of Appeals may cause to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 13th day of October, in the year of our Lord one thousand nine hundred and twenty and of the Independence of the United States one hundred and forty-fifth.

[Seal]

W. B. MALING,
Clerk.

By C. M. Taylor,
Deputy Clerk.

ORDER.

And now on this 13th day of October, 1920, it is ordered that the foregoing writ be and the same is hereby allowed.

M. T. DOOLING,
District Judge. [63]

[Endorsed]: No. 8517. In the United States Circuit Court of Appeals for the Ninth Circuit. Binger Stewart Herine, also Known as Binger Stewart Horine, Plaintiff in Error, vs. United States

of America, Defendant in Error. Writ of Error. Filed Oct. 14, 1920. W. B. Maling, Clerk. By I. L. Baldwin, Deputy Clerk. [64]

Return to Writ of Error.

The Answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 14th day of October, A. D. 1920, duly lodged in the case in this court for the within named defendant in error.

By the Court.

[Seal]

WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [65]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 8517.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Citation on Writ of Error.

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States to The United
States, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit of Appeals to be holden at the City and County of San Francisco in the State of California within thirty (30) days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the Southern Division of the United States District Court for the Northern District of California, wherein Binger Stewart Herine, also known as Binger Stewart Horine, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 28th day of October, 1920.

M. T. DOOLING,
District Judge. [66]

Rec'd a copy of the within citation on writ of error this 28th day of October, 1920.

FRANK M. SILVA,
U. S. Attorney.
ALBERT M. HARDIE,
Asst. U. S. Attorney.

[Endorsed]: No. 8517. In the United States Circuit Court of Appeals for the Ninth Circuit. Binger Stewart Herine, also known as Binger Stewart Horine, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Oct. 28, 1920. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [67]

[Endorsed]: No. 3665. United States Circuit Court of Appeals for the Ninth Circuit. Binger Stewart Herine, also Known as Binger Stewart Horine, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed March 23, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Order Extending Time to and Including December
15, 1920, to File Record and Docket Cause.**

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiff in error in this cause may have and he is hereby granted to and including the 15th day of December, 1920, in which to file the record thereof and docket the case with the clerk of this Court, and the time for such filing and docketing is hereby enlarged accordingly.

Dated: This first day of November, 1920.

WM. W. MORROW,
Circuit Judge.

Rec'd a copy of the within order this 1st day of
November, 1920.

FRANK M. SILVA,
U. S. Attorney
ALBERT M. HARDIE,
Asst. U. S. Attorney.

[Endorsed]: No. 3665. In the United States Circuit Court of Appeals for the Ninth Circuit. Binger

Stewart Herine, also Known as Binger Stewart Horine, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Under Rule Sixteen Enlarging Time Within Which to File Record and Docket Cause. Filed Nov. 5, 1920. F. D. Monckton, Clerk. Refiled Mar. 23, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Order Extending Time to and Including February
1, 1921, to File Record and Docket Cause.**

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiff in error in this cause may have and he is hereby granted to and including the first day of February, 1921, within which to file the record thereof and docket the case with the clerk of this court, and the time for such filing and docketing is hereby enlarged accordingly.

Dated: This 14th day of December, 1920.

W. H. HUNT,
Circuit Court Judge.

The above order extending time within which to docket cause is hereby approved.

FRANK M. SILVA,

G.,

U. S. Attorney.

Rec'd a copy of the within order this 14th day of December, 1920.

F. M. SILVA,

U. S. Atty.

By J. T. C.

[Endorsed]: No. 3665. In the United States Circuit Court of Appeals for the Ninth Circuit. Binger Stewart Herine, also Known as Binger Stewart Horine, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Under Rule Sixteen Enlarging Time Within Which to File, Record and Docket Cause. Filed Dec. 14, 1920. F. D. Monckton, Clerk. Refiled Mar. 23, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Order Extending Time to and Including March 1, 1921, to File Record and Docket Cause.

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiff in error in this cause may have and he is hereby granted to and including the first day of March, 1921, within which to file the record thereof and docket the case with the clerk of this Court, and the time for such filing and docketing is hereby enlarged accordingly.

Dated: This 31st day of January, 1921.

WM. W. MORROW,
Circuit Judge.

The above order extending time within which to docket cause is hereby approved.

FRANK M. SILVA,
U. S. Attorney.
By ALBERT M. HARDIE,
Asst. U. S. Attorney.

[Endorsed]: No. 3665. In the United States Circuit Court of Appeals for the Ninth Circuit. Binger Stewart Herine, also Known as Binger Stewart Horine, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Extending Time. Filed Feb. 1, 1921. F. D. Monckton, Clerk. Refiled Mar. 23, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 8517.

BINGER STEWART HERINE, also Known as
BINGER STEWART HORINE,
Plaintiff in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Order Extending Time to and Including April 1,
1921, to File Record and Docket Cause.**

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiff in error in this cause may have and he is hereby granted to and including the first day of April, 1921, within which to file the record thereof and docket the case with the clerk of this court, and the time for such filing and docketing is hereby enlarged accordingly.

Dated: This 26th day of February, 1921.

WM. W. MORROW,
Circuit Judge.

The above order extending time within which to docket cause is hereby approved.

FRANK M. SILVA,
U. S. Attorney.
By BEN F. GEIS,
Asst.

[Endorsed]: No. 3665. In the United States Circuit Court of Appeals for the Ninth Circuit. Binger Stewart Herine, also Known as Binger Stewart Horine, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including April 1, 1921, to File Record and Docket Cause. Filed Feb. 26, 1921. F. D. Monekton, Clerk. Refiled Mar. 23, 1921.. F. D. Monekton, Clerk.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BINGER STEWART HERINE, also known as
BINGER STEWART HORINE,
Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

CHAUNCEY F. TRAMUTOLO,
Attorney for Plaintiff in Error.

FILED

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F. D. MONCATTI

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Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The plaintiff in error was charged by an information filed June 22, 1920, in the Southern Division of the United States District Court for the Northern District of California, with violating the act commonly known as the National Prohibition Act. The information, which will be found at pages 2-7 of the Transcript of Record, is in three counts. The charging part of the first count alleges that the defendant, on the 20th day of June, 1920, at San Francisco, in the County of San Francisco, in the Southern Division of the Northern District of California, after the date upon which

the Eighteenth Amendment to the Constitution of the United States went into effect, had unlawfully, wilfully and knowingly, in violation of Section 21 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, maintained a common nuisance, in that he did unlawfully, wilfully and knowingly *keep* on the premises situated at 457 Ellis Street, known as Summerville Apartments, to-wit, Rooms 3, 4 and 5, certain intoxicating liquor, to-wit, sherry wine and port wine, containing one-half of one per cent or more alcohol by volume, and then and there fit for use for beverage purposes.

The second count charges the defendant with a sale of the said liquor, made at the aforesaid place, on the 19th day of June, 1920, and the third count charges a sale alleged to have been made on the following day.

Prior to the trial of the cause, the plaintiff in error, by his attorney, filed a petition for the return of the liquor seized in the defendant's apartments on the evening of his arrest, upon the ground that the liquors were the lawful property of the defendant, and were taken from his bona fide and lawful domicile without a search warrant or other legal process. (Transcript, pages 9-13.)

An order to show cause was issued by the trial judge, to which the United States Attorney filed two separate returns, which will be found at pages 16 and 19 respectively of the transcript. A hearing was had upon the petition, and the return

thereto, and it was ordered by the court that the order to show cause be discharged, and the petition denied. (Transcript, page 25.)

At the trial of the cause, the liquor taken from the defendant's apartment was introduced in evidence. The jury returned a verdict finding the defendant guilty on Count One, the count charging the maintaining of a common nuisance, and not guilty on Counts Two and Three, which charged the making of sales. (Transcript of Record, page 28.) Thereafter, the defendant interposed motions for a new trial and in arrest of judgment, (pages 58-61) which were denied by the court, and judgment was thereupon pronounced that the defendant be imprisoned in the county jail of the City and County of San Francisco for a period of three months. Thereafter a writ of error was duly allowed and issued, which brings the record before this court.

Specification of Errors.

In seeking a reversal of this judgment, the plaintiff in error relies upon the following errors committed by the trial court:

(1) That the trial court erred in denying the petition of the plaintiff in error for the return of the liquor illegally seized in his domicile, without a search warrant or other legal process.

(2) That the count of the information upon which the plaintiff in error was convicted does

not state facts sufficient to charge the plaintiff in error with having committed any crime or offense against the laws of the United States, and that, therefore, the trial court erred in denying the plaintiff in error's motion in arrest of judgment.

(3) That the evidence introduced and received at the trial of this cause was wholly insufficient to justify a verdict of guilty, and that the trial court, therefore, committed error in denying the motion to set aside the verdict and grant a new trial.

Brief of the Argument.

I.

THE TRIAL COURT COMMITTED ERROR IN DENYING THE PETITION OF THE PLAINTIFF IN ERROR TO RETURN THE LIQUOR ILLEGALLY SEIZED.

There is no controversy over the fact that the liquor taken from the apartment of the plaintiff in error was seized by the arresting officers without a warrant or other legal process. The only attempted justification for the seizure in this manner is set forth in the second return to the order to show cause, in the following words:

“That on the 20th day of June, 1920, at the hour of 1:30 o'clock A. M. of said day, Harvey A. Delign, as such officer, received a telephone call from the Summerville Apartments, located at 457 Ellis Street, City and County of San Francisco, California, informing him that the peace and quiet of the occupants of said apartments were being disturbed by loud and bois-

terous noises made by persons in rooms 3, 4 and 5 of said apartments, and that intoxicating liquors were then and there being sold unlawfully in said rooms. That in response to said call and information said Harvey A. Delign, accompanied by other police officers of the said city and county, immediately went to rooms 3, 4 and 5 of said Apartments and found the door of said rooms wide open, and in plain view saw bottles of intoxicating liquor and numerous glasses for serving intoxicating liquors, and then and there heard loud and boisterous noises being made by occupants of said rooms, and thereupon said Harvey A. Delign, and said other officers entered said rooms and found therein five men and three women, one of which said men was defendant herein, and each and all of said men and women were then and there under the influence of intoxicating liquor to the extent of being drunk, noisy and boisterous, disturbing the peace and quiet of the occupants of said Summerville Apartments. That then and there in said rooms, and in plain view of said Harvey A. Delign, and said other officers there were numerous bottles and three (3) kegs containing sherry and port wine containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes. That the said defendant then and there and in the presence of said Harvey A. Delign, and the said other officers furnished and delivered to four (4) of said five men and to said three women a part of the said wine and the same was then and there by said men and women drunk. That the said defendant then and there said to Harvey A. Delign and to said other officers that he was selling said wine. That two of the said men to whom said defendant furnished and delivered the said wine then and there and in the presence of defendant said to said Harvey A. Delign

and said other officers, that they paid to defendant twenty-five cents per drink for said wine. That defendant then and there stated to Harvey A. Delign, that he resided in room 214, of the Adair Hotel located at 445 Ellis Street, in the said City and County of San Francisco, and that he had no permit of any kind to move any of said wine from said hotel to said Summerville Apartments. That thereupon said Harvey A. Delign arrested said defendant and then and there, and at the time of the said arrest, took into his possession, of said wine ten full bottles, one keg full and two partly filled kegs, and of the said bottles some of them contained sherry and some contained port wine, and of the said kegs some contained sherry and some port wine, and all of said wine then and there contained one-half of one per cent and more of alcohol by volume, and was then and there fit for use for beverage purposes, and was then and there in the possession of the defendant and intended by him for use and was then and there being used in violation of Title II of the Act of October 28th, 1919, and known as the 'National Prohibition Act'. That the said defendant, as hereinbefore set out, then and there stated to said Harvey A. Delign, that he, said defendant's, residence was then at 445 Ellis Street, in the said City and County of San Francisco, and upon information thereafter received from the clerk of the hotel located at 445 Ellis Street, that said defendant on the said 20th day of June, 1920, resided at said hotel, the said Harvey A. Delign has reason to believe, and does believe, and upon such information and belief alleges the fact to be, that said defendant's residence on the said 20th day of June, 1920, was at and in the Hotel Adair, 445 Ellis Street, and that defendant on said 20th day of June, 1920, had no bona fide or lawful residence in said

Summerville Apartments, nor at 457 Ellis Street, in said City and County of San Francisco, California. That John L. Considine, as District Prohibition Officer, or otherwise, has not, nor has any official of the plaintiff herein, ever seized, had in his possession or retained any of the said wine.”

Does this return set forth sufficient grounds to have warranted the court in denying the petition for the return of the liquor?

At this juncture it may be well to call the attention of the court to the following considerations:

First: The jury found the defendant *not guilty* of making the alleged *sales* of liquor, and, therefore, that portion of the return must, for the purpose of this argument, be disregarded; *Second:* The return contains no proper denial that the premises in which the liquor was found were the lawful and bona fide residence of the plaintiff in error. It will be noted that the denials contained in the return, that the premises were the defendant's residence, are made upon information and belief only. It is our contention, therefore, that in view of the fact that the liquor was illegally seized, its return to the plaintiff in error should have been ordered, and its admission in evidence at the trial of the case was error.

The question is settled, we submit, by two recent decisions of the Supreme Court of the United States. In *Gould v. United States* (No. 250, decided February 28, 1921; Advance Opinions No. 10, page 311), Mr. Justice Clarke says:

“The 4th Amendment reads:

“ ‘The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.’

“The part of the 5th Amendment here involved reads:

“ ‘No person * * * shall be compelled in any criminal case to be a witness against himself.’

“It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524, in *Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652, L. R. A. 1915 C, 1177, and in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 64 L. Ed. 319, 40 Sup. Ct. Rep. 182) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the ‘full enjoyment of personal security, personal liberty, and private property’; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen,—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or ‘gradual depreciation’ of the rights secured by them, by imperceptible practice of

courts, or by well-intentioned but mistakenly over-zealous executive officers.”

Later, in the same decision, we read:

“The prohibition of the 4th Amendment is against all unreasonable searches and seizures; and if for a government officer to obtain entrance to a man’s house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers, would be an unreasonable, and therefore a prohibited, search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded, and the search and seizure would be as much against his will in the one case as in the other; and it must therefore be regarded as equally in violation of his constitutional rights.”

The last quotation from the Gouled case is decisive of the case at bar, because it settles in favor of the plaintiff in error the contention that may be raised by the Government, that the record does not show any protest against the seizure on the part of the defendant. Certainly a protest would have been of no avail, in view of the fact that the defendant was confronted by several police officers, who made such a show of force that resistance upon his part would have been unavailing.

The case of *Amos v. United States*, which will be found in the same number of the *Advance Opinions*, and immediately following the Gouled case, was a

prosecution for violating the Federal Internal Revenue laws, and the Supreme Court had before it the question of the admissibility in evidence of certain whiskey seized by revenue agents from the defendant's house without a warrant. In the Amos case, in which Justice Clarke also wrote the opinion, it is held that even though the petition for the return of the seized liquor was not presented until after the jury was impaneled, it was, nevertheless, error for the trial court to deny such a petition.

In the course of its opinion, the court says:

"After the jury was sworn, but before any evidence was offered, the defendant presented to the court a petition, duly sworn to by him, praying that there be returned to him described private property of his which it was averred the district attorney intended to use in evidence at the trial, and which has been seized by P. J. Coleman and C. A. Rector, officers of the government, in a search of defendant's house and store 'within his curtilage,' made unlawfully and without warrant of any kind, in violation of his rights under the 4th and 5th Amendments to the Constitution of the United States.

"Upon reading of this petition and hearing of the application it was denied, and, exception being noted, the trial proceeded.

"Coleman and Rector were called as witnesses by the government and testified: That, as deputy collectors of internal revenue, they went to defendant's home, and, not finding him there, but finding a woman who said she was his wife, told her that they were revenue officers, and had come to search the premises 'for violations of the revenue law;' that thereupon the woman opened the store and the witnesses entered, and in a barrel of peas found a bottle containing not

quite a half-pint of illicitly distilled whiskey, which they called 'blockade whiskey'; and that they then went into the home of defendant, and, on searching, found two bottles under the quilt on the bed, one of which contained a full quart and the other a little over a quart of illicitly distilled whiskey. The government introduced in evidence a pint bottle containing whiskey, which the witness Coleman stated, 'was not one of the bottles found by him, but that the whiskey contained in the same was poured out of one of the two bottles that had been found in defendant's house on the bed under the quilt, as stated.' On cross-examination both witnesses testified that they did not have any warrant for the arrest of the defendant, nor any search warrant to search his house, and that the search was made during the daytime, in the absence of the defendant, who did not appear on the scene until after the search had been made.

"After these two government witnesses had described how the search was made of defendant's home without warrant either to arrest him or to search his premises, a motion by counsel to strike out their testimony was denied and exception noted.

"This statement shows that the trial court denied the petition of the defendant for a return of his property, seized in the search of his home by government agents without warrant of any kind, in plain violation of the 4th and 5th Amendments to the Constitution of the United States, as they have been interpreted and applied by this court in

Boyd v. United States, 116 U. S. 616, 29 L.

Ed. 746, 6 Sup. Ct. Rep. 524;

Weeks v. United States, 232 U. S. 383, 58 L.

Ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct.

Rep. 341, Ann. Cas. 1915C, 1117; and in

Silverthorne Lumber Co. v. United States,
251 U. S. 385, 64 L. Ed. 319, 40 Sup. Ct.
Rep. 182;

and also denied his motion to exclude such property and the testimony relating thereto, given by the government agents after both were introduced in evidence against him, when he was on trial for a crime as to which they constituted relevant and material evidence, if competent.

"The answer of the government to the claim that the trial court erred in the two rulings we have described is, that the petition for the return of defendant's property was properly denied because it came too late when presented after the jury was impaneled, and the trial, to that extent, commenced, and that the denial of the motion to exclude the property and the testimony of the government agents relating thereto, after the manner of the search of defendant's home had been described, was justified by the rule that, in the progress of the trial of criminal cases, courts will not stop to frame a collateral issue to inquire whether evidence offered, otherwise competent, was lawfully or unlawfully obtained.

"Plainly, the questions thus presented for decision are ruled by the conclusions this day announced in No. 250, *Gouled v. United States*.

"There is nothing in the record to indicate that the allegations of the petition for the return of the property, sworn to by the defendant, were in any respect questioned or denied, and the report of the examination and appropriate cross-examination of the government's witnesses, called to make out its case, shows clearly the unconstitutional character of the seizure by which the property which it introduced was obtained. The facts essential to the disposition of the motion were not and could not be denied; they were literally thrust upon

the attention of the court by the government itself. The petition should have been granted; but, it having been denied, the motion should have been sustained.

“The contention that the constitutional rights of defendant were waived when his wife admitted to his home the government officers, who came, without warrant, demanding admission to make search of it under government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that, under the implied coercion here presented, no such waiver was intended or effected.”

If these two decisions were not sufficient to sustain our contention, we have this further fact in the case at bar; that since the premises were the residence of the plaintiff in error, the taking of liquor *even with a search warrant*, would have been illegal, unless the warrant had been based upon an affidavit setting forth the evidence of sales. This is apparent from the plain provisions of the National Prohibition Act itself, which, drastic though it is to an almost unprecedented degree, yet recognizes that American citizens have some rights which even prohibition enforcement officers should be compelled to respect. Section 25 of Title II of the Act provides in part:

“No search warrant shall issue to search any private dwelling occupied as such, unless it is being used for the unlawful sale of intoxicat-

ing liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house.’’

To hold that evidence obtained in this manner is admissible against a defendant prosecuted under the provisions of this Act would be contrary to public policy, and to the most elementary constitutional rights. It is true that the 18th Amendment to the Constitution of the United States, however mistaken it may be as a matter of policy to write sumptuary legislation into the organic law of the land, is, nevertheless, a part, for the time being, of the fundamental law, and as such should be respected and enforced. But it is likewise true that the 4th Amendment to the Constitution is just as much a part of that instrument as the latter amendment, and is just as much entitled to observance, enforcement and respect. If private residences and hotel rooms are to be subject to arbitrary entrance and search by enforcement officials or police officers, all rights of privacy will be abrogated, and the time-honored maxim that one’s home is his castle will cease to have any significance. No free people will long brook the espionage of meddling and bureaucratic officials. As Lord Macaulay has justly observed, “One can make shift to live under a tyrant or a debauchee, but to be ruled by a busybody is beyond human endurance.”

II.

THE COURT ON THE INFORMATION UPON WHICH THE PLAINTIFF IN ERROR WAS CONVICTED DOES NOT CHARGE ANY CRIME AGAINST THE UNITED STATES.

The charging part of that count of the information upon which the plaintiff in error was convicted alleges:

“Now, therefore, your informant presents: that

Binger Stewart Herine,
hereinafter called the defendant heretofore, to wit, on the 20th day of June, 1920, at San Francisco, in the County of San Francisco, in the Southern Division of the Northern District of California, after the date upon which the Eighteenth Amendment to the Constitution of the United States went into effect did unlawfully, wilfully and knowingly, in violation of section 21 of Title II of the Act of October 28, 1919, known as the ‘National Prohibition Act,’ maintain a common nuisance in that he did unlawfully, wilfully and knowingly keep on the premises situated at 457 Ellis Street, known as Summerville Apartments, to wit, Rooms 3, 4, and 5 certain intoxicating liquor, to wit, sherry wine, and port wine containing one-half of one per cent or more alcohol by volume, and then and there fit for use for beverage purposes.”
(Transcript, pages 3-4.)

This count of the information is absolutely insufficient for two reasons:

(a) The information does not allege that the liquor kept on the premises therein described was kept by the defendant for the purpose of sale, or for any other unlawful or illegal purpose. The so-

called Volstead Act, drastic though it is, does not make the mere possession of liquor a crime. Section 33 of Title II of the Act provides:

“It shall not be unlawful to possess liquors in one’s private dwelling while the same is occupied and used by him as his dwelling only, and such liquor need not be reported.”

Before the possession of liquor can be unlawful, it must appear that the liquor is possessed for the purpose of sale, or for some other purpose prohibited by the act in question. It is true that the same section of the Act provides that

“the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used,”

—but this provision sets forth a rule of evidence and not a rule of pleading. It is an elementary rule that the words, “unlawfully, wilfully and knowingly,” which are used in the first count of this information, are mere conclusions of the pleader, which tender no issue. No indictment or information is sufficient, unless it states facts which show that the defendant has been guilty of a crime, and no presumption or inference can be indulged in to support an otherwise defective pleading. To hold to any other rule would be to deprive a defendant charged with a violation of the National Prohibition Act of the fundamental right, also guaranteed by the Constitution, to be informed of the nature of the accusation against him. The so-called Volstead Act is a lengthy enactment, which makes unlawful a great

variety of acts never before inhibited by legislative enactment. If the pleader who drafts an indictment or information under that Act is permitted to merely plead that the thing done by the defendant was unlawful without setting forth any facts to show how, or in what manner the act was unlawful, or wherein its illegality consists, then the legislative power might just as well abolish all pleadings or formal accusations in prosecutions under this Act.

It is an elementary rule that where a statute uses generic terms or general expressions which do not in themselves inform the defendant of the particular thing charged, it is insufficient to charge the offense in the bald language of the statute, but that the indictment or information must descend to particulars and must set forth the acts constituting the offense alleged. This rule is well stated by Judge Dooling in *United States v. Bopp*, 230 Fed. 721, in which decision the earlier Federal decisions to this effect are cited. In view of the fact that this information does not allege how or in what manner the keeping of the liquor by the defendant was unlawful, we submit that the information does not state facts sufficient to charge this defendant with crime.

(b) Regardless of what provisions may be contained in the so-called Volstead Act, we contend that it is beyond the power of Congress to make the mere possession of liquor a crime, and that the National Prohibition Act, in so far as it attempts to make criminal the possession or personal use of liquor, is unconstitutional and void. Accordingly, we

submit, that an information such as the one in question, which merely charges the keeping of liquor, even though such an information is in conformity with the so-called Volstead Act, does not charge a crime, because the portion of the act upon which it is based is unconstitutional.

It will be conceded at the outset, we think, that in the absence of a constitutional amendment, Congress would have had no right to pass a prohibition act, such measures being exclusively within the reserved power of the states. Accordingly, Congress could go no further than the 18th Amendment empowered it to go. The Constitution of the United States is a grant of power, and the various departments of the Federal Government possess only those powers which are expressly or impliedly conferred on them by the Constitution.

South Carolina v. United States, 199 U. S. 437;

Martin v. Hunter, 1 Wheaton 304;

United States v. McCullough, 221 Fed. 288.

An act of Congress for the enforcement of a Constitutional provision is void, if it is broader in its terms than the Constitutional provision which it was enacted to enforce.

Kareem v. United States, 121 Fed. 250; 61 L. R. A. 437.

Now, the 18th Amendment to the Constitution of the United States does what? It prohibits three things: (1) the manufacture; (2) sale; (3) trans-

portation of alcoholic liquor for beverage purposes. The possession and use of liquor for such purposes is not prohibited. Congress had the power, by virtue of this Amendment, to prohibit the manufacture, sale or transportation of liquor for beverage purposes, but it had no power to prohibit the mere keeping or possession of alcoholic liquor. Therefore, when Congress attempted in Section 21 of Title II of the Volstead Act, if it did so attempt, to prohibit the mere keeping of liquor and to denounce as a common nuisance any place where liquor was kept, it transcended the powers conferred upon it by the Amendment, and the Volstead Act is to that extent unconstitutional and void.

III.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE VERDICT.

The evidence introduced at the trial was manifestly insufficient to warrant a conviction for two reasons:

First: The uncontradicted evidence of the defendant shows that the apartment in which the arrest was made, and the liquor found, was his actual and bona fide residence. The defendant's testimony shows that he had rented the rooms in which he was arrested in anticipation of his approaching marriage, and that the liquor which was found by the officers was liquor which he had possessed before the National Prohibition Act went

into effect. Prior to the enactment of the Volstead Act the defendant was a saloonkeeper conducting what was known as the "Cadillac Bar", and when the drastic law became effective, he moved the remainder of his stock to his room in the Adair Hotel, reporting such removal to the proper officials. (Transcript of Record, page 53.) On the evening in question, his contention is that he was holding a little party to celebrate his approaching marriage, when the officers broke in and made the arrest. We feel somewhat tempted to ask, on reading the record, whether we are now living in the United States of America, in the twentieth century, or in the days of Cromwell, when the Puritans cut down the Maypoles, closed the theatres, and prohibited bear-baiting, not because it gave pain to the bear, but because it gave pleasure to the spectators. The evidence that the liquor was lawfully acquired before the Prohibition Act went into effect is uncontradicted, and was apparently conceded by the Government at the time of the trial. It will not avail the Government anything to contend that the evidence shows that the defendant was making illegal sales on the premises, because on the second and third counts of the information that charged the making of sales, the jury returned a verdict of not guilty. Therefore, the Government must stand or fall on the evidence that relates to *keeping* alone, which is the one allegation upon which the charge of maintaining a common nuisance is based. That the mere keeping and possession of liquor in the defendant's apart-

ment was not illegal is too plain to attempt to question. He had a right to possess it under the plain terms of the Volstead Act itself. (Section 33, Title II.) He likewise had a perfect right to remove it from his old to his new residence. This was decided by the Supreme Court of the United States in the recent case of *Street v. Lincoln Safe Deposit Company*, on January 5, 1921.

In that case the Supreme Court holds that an intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction, and the case likewise holds that a transportation of lawfully acquired liquors from a warehouse to the home of the owner is not such a transportation as is prohibited by the Prohibition Act.

Second: The evidence is absolutely insufficient to establish that the defendant was keeping a common nuisance, because the most that it shows was the possession and use of the liquor on one day. Before any place can be a nuisance, it must be common; it must have acquired a status. The information in this case does not charge that liquor was kept in the premises on more than one particular day, and the evidence shows only the one occurrence. The decisions are almost uniform to the effect that a single sale of liquor is not sufficient to constitute the place in which such sale is made a common nuisance. Thus, in *State v. McIntosh*, 98 Me. 397, 57 Atlantic 383, which was a prosecution under an

indictment charging the defendant with keeping and maintaining a liquor nuisance, it is held that:

“One or more unlawful sales of intoxicating liquor in a place does not necessarily, and as a matter of law, make that place a common nuisance. The place must be habitual, commonly used for that purpose, before it becomes a common nuisance.”

The same rule is laid down in

State v. Stanley, 24 Atl. 983;

Commonwealth v. Patterson, 138 Mass. 498.

To quote from the brilliant and witty opinion of Justice Robinson in *Scott v. State*, 163 NW 813:

“One swallow does not make a summer; one love affair does not make a bawdy house. The house must be used for illegal and immoral purposes, the wrong must be common or it is not a common nuisance and the legislature cannot make it otherwise. It is perfectly absurd to say that the keeping of a house wherein one, two or three drinks are sold or given away is the keeping of a common nuisance.”

A recent Federal decision to the same effect is *United States v. Cohen*, 268 Fed. 420. That case was a prosecution under the equity sections of the Volstead Act to enjoin the defendant from maintaining a common nuisance on his premises by the illegal sale therein of intoxicating liquors, and by the unlawful keeping for sale at and on said premises liquors which contained alcohol in quantities forbidden by the Act. It will be noted that the allegations of the bill in that case alleged sales and keeping for purposes of sales, whereas the first

count of the information in the case at bar charges nothing more than a mere keeping. In the course of a very learned discussion of the meaning of the nuisance provisions of the Volstead Act, the court says:

“The word ‘nuisance’ has a well-defined meaning in the law, and a thing cannot be declared a nuisance by statute, and abated as such, when in fact it is obviously not a nuisance. The rule laid down by the Supreme Court of the United States upon this point is that—

“‘While the Legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed.’

Lawton v. Steele, 152 U. S. loc. cit. 140, 14 Sup. Ct. 502, 38 L. Ed. 385.

“This is clearly the farthest limits of the rule, so far as concerns the extent to which the Legislature may encroach on private rights, in the destruction, abatement, or damage of private property as a public nuisance. Further encroachment is forbidden by those provisions of the organic law having reference to the constitutional guaranty of due process of law and forbidding the taking of private property for public use without just compensation. Lawton v. Steele, *supra*; Austin v. Murray, 16 Pick. (Mass.) 121; Slaughterhouse Cases, 16 Wall, 36, 21 L. Ed. 394; Brown v. Perkins, 12 Gray (Mass.) 98.

“The extent of the encroachment upon the rights and property of the individual, permissible to the law-making bodies in the valid

exercise of the police power, has been always a most strongly mooted question. Those urging broader constructions have won much ground, but it has been surrendered grudgingly. Generally, in the valid exercise of the police power are included all things essential to the conservation of the public safety, public health, and public morals. But this sweeping general rule is modified by a consideration of the rights of the private individual. Hedging it about is the consideration that—

“‘To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.’ *Lawton v. Steele*, 152 U. S. loc. cit. 137, 14 Sup. Ct. 501, 38 L. Ed. 385.

“The Congress, therefore, must be deemed to have used the word in its usual and ordinary legal significance, and to have had in mind that it could not pass a law which had the effect to wipe out the constitutional rights of the citizen in private property

“The idea of either continuousness of existence of the things, or facts, or acts, which constitute the alleged nuisance, or the recurrence of such acts, so as to create damage, annoyance, discomfort, or inconvenience, is cannnoted by the presence of the word ‘use’ in the common-law definition. Discussing a

very similar statute of the state of Kansas, the Supreme Court of the United States said:

“ ‘The statute is prospective in its operation; that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the Legislature to be injurious to the community. Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the state to be such. It must first find it to be of that character; that is, must ascertain, in some legal mode, whether since the statute was passed the place in question has been, or is being, so used as to make it a common nuisance.’ *Mugler v. Kansas*, 123 U. S. loc. cit. 672, 8 Sup. Ct. 303, 31 L. Ed. 205.

“I conclude that Congress, by the use of the words, ‘sold, kept or bartered’ in violation of law, meant either habitually, or continuously, or recurrently so sold, kept, or bartered. I do not think that a single sale, without more, and with no evidence of the continuation or recurrence of law violation, or of facts strongly indicating either habitual sales, or long-continued violations, or such a recurrence of unlawful acts or sales as to colorably indicate that the criminal prosecutions and penalties provided by other parts of the act are inadequate to cope with the situation, would constitute a nuisance or warrant the interference of a court of equity by injunction; for in such case it is not the crime of selling liquor, or selling a single drink of liquor, by a given person, at a given place, which constitutes the nuisance, but it is the maintenance and use of the room, house, or place as a situs for the doing thereat of unlawful or criminal acts, which constitute the nuisance.

“If the Volstead Act is construed to mean that a single sale is sufficient to constitute a nuisance, I should seriously question its validity,

for upon such a view we are met by the rule which forbids equity taking jurisdiction where an inadequate remedy at law exists, as also the rule that even Congress may not say a thing is a common nuisance, when in fact it is not. For a single sale, without more, and without other overt acts, can be punished by a fine or imprisonment, and a subsequent sale by both such fine and imprisonment. Such remedy was seemingly deemed sufficient, or at least sufficient punishment; otherwise, Congress would have made the penalty more severe. It is fairly well settled that equity will not enjoin the commission of a crime."

Clearly the indictment in the case at bar does not aver sufficient facts to charge the defendant with keeping a nuisance, and the evidence falls far short of showing that the wedding party in which the defendant participated was of such a character as to confer upon his apartment the status contemplated by the Act.

It is respectfully submitted that for the reasons herein set forth the judgment of the court below should be reversed.

Dated, San Francisco,

October 1, 1921.

CHAUNCEY F. TRAMUTOLO,
Attorney for Plaintiff in Error.

No. 3665

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BINGER STEWART HERINE, also
known as Binger Stewart Horine,
Plaintiff in Error.

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

JOHN T. WILLIAMS,
United States Attorney.

THOMAS J. SHERIDAN,
Assistant United States Attorney.
Attorneys for Defendant in Error.

No. 3665

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BINGER STEWART HERINE, also known as Binger Stewart Horine, <i>Plaintiff in Error.</i>	}
VS.	

THE UNITED STATES OF AMERICA, <i>Defendant in Error.</i>	}
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BRIEF OF DEFENDANT IN ERROR

I

STATEMENT OF THE CASE

The plaintiff in error was found guilty on the first count of an information filed against him in the District Court of the United States for the Northern District of California, in which it was charged that on June 20, 1920, at San Francisco within the jurisdiction of the Court, he did "*unlawfully, wilfully and knowingly, in violation of* section 21 of Title II of the Act of October 28, 1919, known as the 'National Prohibition Act,' maintain a common nuisance in that he did unlawfully, wilfully and knowingly

keep on the premises situated at 457 Ellis Street, known as Summerville Apartments, to-wit, Rooms 3, 4 and 5, certain intoxicating liquor, to-wit, sherry wine, and port wine containing one-half of one per cent or more alcohol by volume, and then and there fit for use for beverage purposes.”

He was found not guilty on two other counts of the information charging unlawful sales of intoxicating liquors at the same place.

At the trial the Government submitted testimony in support of the allegations of the information as appears from page 41 to 55 of the transcript, and which is too long to be quoted here. But it was shown generally that at about 1:30 o'clock in the morning of June 20, 1920, a telephone call came to the Central Police Station of San Francisco, summoning the police to the Summerville Apartments at 457 Ellis Street; that thereupon four police officers, including one Deligne, went to the Apartments. When they reached apartments 3, 4 and 5 they found the doors of rooms 3 and 5 open and could see from the outside numerous bottles on a sink and table and glasses, etc., some full and some empty and a few kegs, and there were certain men and women in the apartments drinking liquor, and loud laughter and talking. The plaintiff in error stepped forward and said he was the owner of the apartments; that he had been manager of the Cadillac Bar at another place, that that was a saloon, and he then stated “I am still in the business and not in it for my health. You men can see

what I am doing, no use trying to fool you people.” He was dispensing wine to the persons present, serving it in glasses on a tray. Two of the persons present stated that they had paid 25c a drink for the wine, and plaintiff in error heard this statement and admitted it. Some at least of the people present were intoxicated. Plaintiff in error then stated that he did not live at that place, that he lived in another apartment at the Adair Hotel at 445 Ellis Street. The police officers then arrested plaintiff in error and took the kegs and bottles, which contained sherry wine, to the city prison. There were several kegs and bottles of the wine which it was admitted contained more than one-half of one per cent of alcohol by volume and was shown to be fit for beverage purposes, and which liquor was in the immediate possession of plaintiff in error at the apartments, plainly visible to all concerned.

The plaintiff in error was sentenced on the said conviction to be imprisoned for three months in the county jail of San Francisco.

On September 23, 1920, the defendant filed his verified petition in the district court asking for an order directing the said Deligne and also John L. Considine, District Prohibition Enforcement Officer, to return to him the said liquors. The petition, although verified, was meager in its allegations. It is embraced in the Bill of Exceptions and appears in the transcript at page 29. There was also

filed by him at the same time an unverified so-called Bill of Particulars, which adds little to the statement of facts. In response to the petition and an order to show cause issued thereon, the said Deligne filed his verified return, wherein he set forth substantially the facts and incidents of the arrest as above stated, set forth that he is and was at all times concerned a police officer of the city and county of San Francisco and at all times acted as such and further that the said Considine as District Prohibition Officer, or otherwise, had not, nor had any official of the Government, ever seized or had possession of or retained any of the said wine. He showed further that at the time he arrested the defendant, he, the defendant, stated that his residence was then at 445 Ellis Street as above set forth, and that while he, the defendant, owned the liquors, he had no permit to move them to the Summerville Apartments, and also, that he, the said defendant had stated at the said time to the officers that he was selling the wine. The application of defendant for the return of the liquors was submitted on the said petition, bill of particulars and return of Officer Deligne, and was by the Court denied.

The plaintiff in error urges before this Court

(a) That the Court erred in denying his petition for the return of liquors;

(b) That the information upon which he was convicted does not charge any crime; and

(c) That the evidence was insufficient to justify the verdict.

II.

ARGUMENT.

A. THE COURT PROPERLY DENIED THE PETITION OF PLAINTIFF IN ERROR FOR THE RETURN OF THE LIQUORS. NO PROPER SHOWING WAS MADE IN SUPPORT OF THE PETITION AND THE COURT'S ORDER COULD NOT PROPERLY HAVE BEEN OTHERWISE.

(a) The showing was conclusive that the liquors were seized by the police officers of San Francisco and not by the Government, and that the District Prohibition Officer never seized or had in his possession any of the said liquors, nor had any official of the Government. Accordingly, the District Court would have no jurisdiction to direct the police department of the city and county of San Francisco to return the wine.

Weinstein v. Attorney-General, 271 Fed. 674.

If the liquors had been taken by private parties or by any persons other than Government officers, even if taken in violation of defendant's rights, it would not have prevented their use in evidence. The Government would have had the right to bring the liquors in from the custody of such third persons by subpoena duces tecum.

Burdeau v. McDowell, Advance Opinions U. S. Supreme Court 1920-21, page 683.

The burden was on plaintiff in error to show a case for the granting of his motion, and he failed to show that the Government was concerned in taking the liquors, while respondent showed that it had no part therein. In such case the order for the return was properly denied and the articles so taken were properly received in evidence.

(b) Even had Deligne been an official of the Government, or had the Government seized the liquors on the occasion in question, the seizure would have been entirely proper without a search warrant. The law was being violated, the officers were summoned to the apartments to prevent the disturbance of the peace, which would have been a violation of the state law, and having entered the apartments in response to the summoning, they proceed along the hall to defendant's apartments, found the doors open, the public peace being disturbed, and then and there saw the defendant in unlawful possession of intoxicating liquors and saw him make sales thereof, and heard his admissions that he was selling and that he was in the business of selling and that he did not live there. In such a conjuncture there was but one thing for the officers to do, to wit, arrest the defendant and seize anything on his person or in his immediate presence and under his control which was contraband or used in violating the law. Such seizure would constitute one of the well known exceptions to there being a necessity for a search warrant.

Weeks v. U. S., 232 U. S. 383, 58 L. ed. 652, 655.

(c) Moreover, the order refusing to return the liquors in no manner injured the plaintiff in error, for subsequently, when the liquors were offered in evidence at his trial, he made no objection or took no exception thereto (See Trans. p. 53). In such case it must be deemed that he consented to the use of the liquors in evidence. And at that stage of the case, as will be apparent from a cursory reading of the record, the fact that the plaintiff in error had at the apartments intoxicating liquors which he was selling unlawfully had been testified to by everyone of the Government's witnesses and this without objection or exception. Accordingly, it must be conceded that the first point urged by plaintiff in error is not well taken.

The answer to these considerations made by plaintiff in error seems to be that since the jury found him not guilty of making the sales, that therefore that portion of the return must, for the purpose of this argument, be disregarded. But it must be clear that this is non sequitur. The motion was not to be decided by the jury but by the Court upon evidence *then* before it, and if its action was then correct under the showing, it did not thereafter become erroneous merely from the fact that the jury saw fit to find to the contrary. The exception here urged is as to the action of the Court previous to the trial on a matter not pending before the jury but to be decided by the Court alone. And in any matter properly to be decided by the Court upon testimony, such as preliminary motions,

showing upon voir dire as to the admission of evidence during the trial, the Court would have the right and it would be its imperative duty to reach conclusions of fact upon conflicting testimony upon its own judgment and not that of the jury.

The further contention is made in the same connection that the return contains no proper denial that the premises in which the liquor was found were the lawful residence of plaintiff in error. It may be noted, however, that while the burden was on the plaintiff in error in prosecuting his motion, he himself did not show in his verified petition that the premises in question were his residence. (Trans. p. 29). Such a statement appearing in the so-called Bill of Particulars was not verified. But on the other hand, the statements in the return of Officer Deligne were ample to prove that the premises were not the bona fide residence of plaintiff in error. Such a statement was made by Deligne on information and belief it is true, but the *information* was the statement of plaintiff in error himself, which would have amounted to evidence independent and proper in itself, and not hearsay. (Trans. p. 38).

B. THE FIRST COUNT OF THE INFORMATION UPON WHICH PLAINTIFF IN ERROR WAS CONVICTED IS AMPLY SUFFICIENT TO CHARGE A CRIME AGAINST THE UNITED STATES. IT SHOWS BY PROPER AVERMENTS HIS VIOLATION OF SECTION 21 —

THE NUISANCE SECTION —OF TITLE II OF THE NATIONAL PROHIBITION ACT.

The charge follows the language of the statute with sufficient description to inform the defendant of the nature of the offense charged and the cause of the accusation and with such certainty that he could prepare his defense and plead the judgment in bar of any subsequent prosecution for the same offense. The situation is not dissimilar to that which arose in the case of *Young v. U. S.*, 272 Fed. 967, wherein this Court upheld an information based on section 3 of Title I of the same Act, which was the nuisance section of the portion thereof relating to war prohibition, and which is generally similar to the nuisance section here involved. We think the authority in question is conclusive as to the sufficiency of the first count of the information in the case at bar.

Counsel for plaintiff in error takes note of the provision of the Act that the burden of proof shall be upon the possessor to prove that the liquor was lawfully acquired, possessed and used, but he urges that this provision sets forth a rule of evidence and not of pleading. But he overlooks that section 32 of Title II of the same Act makes a similar regulation as to pleading. It is there provided that in any affidavit, information or indictment, etc., it shall not be necessary to give the name of the purchaser or to include any defensive, negative averments; but that it shall be sufficient to state that the act com-

plained of was then and there prohibited and unlawful. The count of the information measures up to these requirements, especially in view of the consideration that no motion or demurrer was directed to the information, and that under the provisions of section 1025 of the Revised Statutes mere objections to form can not be taken after verdict. The provisions of the law dispensing with the necessity of including defensive, negative averments have been upheld and applied by the Circuit Court of Appeals of other circuits in the following cases:

Rothman v. United States, 270 Fed. 31, 34;

Wallace v. United States, 243 Fed. 300, 304;

Fyke v. United States, 254 Fed. 225;

Melanson v. United States, 256 Fed. 785.

And this Court in the case of *Baender v. U. S.*, 260 Fed. 832, in a case of a prosecution for the unlawful possession of steel dies in likeness and similitude to dies for United States coin, held that where a criminal intent is to be inferred from unlawful possession, it need not be averred in the indictment.

In regard to counsel's further contention that it is beyond the power of Congress to make the mere possession of liquor a crime, it may be answered that it has not done so; that under the Volstead Act all proper or innocent possession of intoxicating liquors is provided for and allowed. The statute does not *prohibit* such possession; it *merely* regulates it. And it can not be reasonably contended that since Congress has the conceded police power under the

Eighteenth Amendment to prohibit the sale or manufacture or transportation of intoxicating liquors for beverage purposes, it has not, as incidental to such power, the further power to regulate innocent possession. This principle is well established and illustrated in such cases as

Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184;

Jacob Ruppert v. Caffey, 251 U. S. 264, 64 L. ed. 260; and

Rhode Island v. Palmer, 64 L. ed. 946, 978.

C. THE EVIDENCE WAS AMPLY SUFFICIENT TO JUSTIFY THE VERDICT.

It may be stated *in limine* that plaintiff in error is not in a position to raise any such question. He did not make any motion for a directed verdict at the conclusion of the testimony. Such a motion was made by him, but it was made at the beginning of his own testimony and being denied, it was not renewed at any subsequent time, although plaintiff in error thereafter testified at length and then two witnesses were recalled in rebuttal by the Government (Trans. p. 52). In such case the motion was waived by the further introduction of evidence, and the failure to renew it at the close of the testimony prevents the plaintiff in error from questioning the sufficiency of the evidence.

Clark v. U. S., 245 Fed. 112, 113;

Hale v. U. S., 242 Fed. 891.

But if the point had been properly raised, it would have no merit. It is said, for example, that the un-

contradicted evidence of the defendant shows that the apartment in which the arrest was made and the liquor found, was his actual and bona fide residence. It is sufficient to point to the following testimony of the Government's witnesses, viz.: Officer Deligne said, p. 47, "The defendant stated to me that he lived at the Adair Hotel, 445 Ellis Street, Room 214." Officer Ohnimus states, p. 44, "I asked him if he lived at that place. He said no, that he lived in another apartment there, in a house adjoining there. I believe it was the Adair Hotel." Officer Brouders states, p. 47, "The defendant said he lived in the Adair Hotel, that is a few doors down from the Summerville." Witness Howard, the manager of the Adair Apartments, states, p. 50, "I know Mr. Herine, the defendant. He was there when I went in on February 15, 1919. He occupied Room 214. The number of the Adair is 445 Ellis Street. He has remained there as a guest in my hotel since that time and is yet." It was further shown by the officers, p. 55, that the appearances of the apartment at the Summerville did not indicate that any one resided or lived there.

Further contention is made on the testimony in that it is insufficient to establish that defendant was keeping a common nuisance and at the most shows possession and use of liquor on one day and that before the place can be a nuisance it must have acquired a status. And certain cases are cited including a decision by a Federal district court in Missouri. The authority so cited related to the civil action in equity

to abate a nuisance. There may be a limit to the power of Congress to authorize the familiar action in equity to abate a particular status calling it a nuisance and then enforce the decree by a contempt proceeding to be determined without a jury. But it is one thing to authorize such a proceeding as affecting a given situation and quite another thing to declare a particular act a crime. Congress has distinctly declared that one who maintains a building, structure or place where intoxicating liquor is kept in violation of the National Prohibition Act is guilty of a crime. It would have power to declare such a crime in the case of a single act; it need not be continuous or recurrent. While it might not have power to make use of the equitable proceeding to abate in such case. The latter situation may be given attention when it arises. It is sufficient in the instant case to point out that whether the law be as counsel contends, the proof is ample to show the guilt of the defendant in establishing and maintaining a status and in doing continuous acts. We cite the Court the following portions of testimony in that behalf:

Officer Deligne testified (Trans. p. 42):

“There were several kegs, one full, and two partly full, and two or three were empty. There were ten bottles full altogether, full of port and sherry wine. I asked who was the owner of these apartments, and Mr. Herine stepped forward and said that he was. He stated that he had been manager of the Cadillac Bar at Eddy and Leavenworth Streets for seven years, that was a saloon, and he stated, ‘*I am still in the business,*

and not in it for my health; *you men can see what I am doing*; no use trying to fool you people!" "

Officer Ohnimus testified (Trans. p. 44):

"I asked the defendant what he was doing there and he stated, 'There is no necessity of lying; I will come clean; *I am selling this stuff.*' I asked him if he had lived at that place; he said no, that he lived in another apartment there, in a house adjoining there; I believe it was the Adair Hotel."

And Officer Brouders testified (Trans. p. 46):

"The defendant said, 'You police people have got me; there is no use,' some words to that effect. He said, 'I have been in the saloon business over in the Cadillac Bar there for five or six years, and still in the business.'"

It thus appears that the defendant's enterprise had acquired a status. It was intended by him to be and it was "habitual," "continuous" and "recurrent."

It thus appears that in that connection the defendant was given all the rights to which he was entitled, that is to say, the right to persuade the jury, if he could, not to draw obvious inferences from the established facts.

We submit that the judgment of conviction of plaintiff in error should be affirmed.

JOHN T. WILLIAMS,
United States Attorney.

T. J. SHERIDAN,
Assistant United States Attorney.
Attorneys for Defendant in Error.

No. 2037

IN THE 10

**United States Circuit Court
of Appeals**

For the Ninth Circuit

THE UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

COLUMBIA & NEHALEM RIVER RAILROAD
COMPANY,

Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District
Court for the District of Oregon.

FILED
1910
NOV 10 1910

No.....

IN THE
United States Circuit Court
of Appeals
For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
COLUMBIA & NEHALEM RIVER RAILROAD
COMPANY,
Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District
Court for the District of Oregon.

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

COLUMBIA & NEHALEM RIVER RAILROAD
COMPANY,

Defendant in Error.

**(NAMES AND ADDRESSES OF THE ATTOR-
NEYS OF RECORD)**

MR. LESTER W. HUMPHREYS,

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MR. THOS. H. MAGUIRE,

Assistant United States Attorney for the District
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For the Plaintiff in Error.

MESSRS. WILBUR, BECKETT & HOWELL,

Board of Trade Building., Portland, Oregon.

For the Defendant in Error.

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IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON
March Term 1920

BE IT REMEMBERED, That on the 3rd day of
April, 1920, there was duly filed in the District Court
of the United States for the District of Oregon a
Complaint, in words and figures as follows, to-wit:

(COMPLAINT)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON
Division.

THE UNITED STATES OF		
AMERICA,		
	Plaintiff,	
vs.		
COLUMBIA & NEHALEM RIVER		
RAILROAD COMPANY,		
	Defendant.	

No. L-8609

Now comes the United States of America, by
Chas. W. Reames, Assistant United States Attorney
for the District of Oregon, and brings this action on
behalf of the United States against the Columbia &

Nehalem River Railroad Company, a corporation, organized and doing business under the laws of the State of Oregon, and having an office and place of business at Kerry, in the State of Oregon; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Oregon.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6:00 o'clock a. m., on September 1, 1919, at its office and station at Kerry, in the State of Oregon, and within the jurisdiction of this Court, required and permitted its certain telegraph operator and employe, to-wit, J. G. Nash, to be and remain on duty for a longer period

than nine hours in said twenty-four-hour period, to-wit: from said hour of 6:00 o'clock a. m. on said date, to the hour of 11:50 o'clock p. m., on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employe, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A SECOND CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Oregon.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon,"

approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 5:50 o'clock a. m., on September 9, 1919, at its office and station at Kerry, in the State of Oregon, and within the jurisdiction of this Court, required and permitted its certain telegraph operator and employe, to-wit, J. G. Nash, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-wit: from said hour of 5:50 o'clock a. m., on said date, to the hour of 10:45 o'clock p. m., on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employe, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A THIRD CAUSE OF ACTION
plaintiff alleges that defendant is, and was during all

the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Oregon.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four period beginning at the hour of 7:00 o'clock a. m. on November 2, 1919, at its office and station at Kerry, in the State of Oregon, and within the jurisdiction of this Court, required and permitted its certain telegraph operator and employe, to-wit: J. G. Nash, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-wit: from said hour of 7:00 o'clock a. m., on said date, to the hour of 1:15 o'clock a. m., on November 3, 1919.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employe, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received

and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FOURTH CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Oregon.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6:00 o'clock a. m., on November 5, 1919, at its office and station at Kerry, in the State of Oregon, and within the jurisdiction of this Court, required and permitted its certain telegraph operator and employe, to-wit, J. G. Nash, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-

wit: from said hour of 6:00 o'clock a. m., on said date, to the hour of 12:30 o'clock a. m., on November 6, 1919.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employe, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FIFTH CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Oregon.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon,"

approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6:00 o'clock a. m., on November 15, 1919, at its office and station at Kerry, in the State of Oregon, and within the jurisdiction of this Court, required and permitted its certain telegraph operator and employe, to-wit, J. G. Nash, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-wit: from said hour of 6:00 o'clock a. m., on said date, to the hour of 9:20 o'clock p. m., on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employe, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of twenty-five hundred dol-

lars and its costs herein expended.

CHAS. W. REAMES,
Assistant United States Attorney.

UNITED STATES OF AMERICA,)
District of Oregon,) ss.
)

I, Chas. W. Reames, being first duly sworn, depose and say that I am a duly appointed, qualified and acting Assistant United States Attorney for the District of Oregon; that I have read the foregoing Complaint and verily believe the contents thereof to be true, in that I make this verification because of reports, documents and files in my possession.

CHAS. W. REAMES.

Subscribed and sworn to before me this 3rd day of April, 1920.

(SEAL) G. H. MARSH,
Clerk of U. S. Court,
By K. F. Frazer, Deputy.

AND AFTERWARDS, to-wit, on the 21st day of May, 1920, there was duly filed in said Court, an Answer, in words and figures as follows, to-wit:

(ANSWER)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF AMERICA,	Plaintiff,	No. L-8609
vs.		
COLUMBIA & NEHALEM RIVER RAILROAD COMPANY,	Defendant.	Answer.

Comes now the defendant, Columbia & Nehalem River Railroad, a corporation, erroneously designated in the complaint as Columbia & Nehalem River Railroad Company, and answering the complaint herein, denies as follows:

I.

Answering the first cause of action alleged in the complaint the defendant denies the same, and each and every allegation thereof.

II.

Answering the second cause of action alleged in the complaint the defendant denies the same, and each and every allegation thereof.

III.

Answering the third cause of action alleged in the

complaint the defendant denies the same, and each and every allegation thereof.

IV.

Answering the fourth cause of action alleged in the complaint the defendant denies the same, and each and every allegation thereof.

V.

Answering the fifth cause of action alleged in the complaint the defendant denies the same, and each and every allegation thereof.

WHEREFORE, the defendant prays that plaintiff take nothing herein, and for judgment against plaintiff for its costs and disbursements.

VEAZIE & VEAZIE,

Attorneys for Defendant.

STATE OF OREGON,)
) ss.
County of Multnomah)

I, J. C. Veazie, being duly sworn, depose and say that I am the secretary of the Columbia & Nehalem River Railroad, the above named defendant, and make this verification on its behalf; that I know the contents of the foregoing answer, and believe the same to be true.

J. C. VEAZIE,

Subscribed and sworn to before me this 21st day of May, 1920.

(SEAL)

R. C. TAYLOR,

Notary Public for the State of Oregon.

My commission expires February 2, 1924.

AND AFTERWARDS, to-wit, on the 15th day of July, 1920, there was duly filed in said Court, a stipulation waiving jury trial, in words and figures as follows, to-wit:

(STIPULATION WAIVING JURY TRIAL)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON
THE UNITED STATES OF
AMERICA,

Plaintiff,

vs.

COLUMBIA & NEHALEM RIVER
RAILROAD COMPANY,

Defendant.

The above-named defendant hereby waives a jury trial.

J. C. VEAZIE,

Attorney for Defendant.

It is hereby stipulated between the parties in this

cause that a jury trial be waived and the above entitled case be tried before the Court.

Dated this 15th day of July, 1920.

J. C. VEAZIE,

Attorney for Defendant.

CHAS. W. REAMES,

Attorney for United States.

AND AFTERWARDS, to-wit, on the 26th day of July, 1920, there was duly filed in said Court, an opinion, in words and figures as follows, to-wit:

(OPINION OF THE COURT)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON
THE UNITED STATES OF
AMERICA,

Plaintiff,

vs.

COLUMBIA & NEHALEM RIVER
RAILROAD COMPANY,

Defendant.

Memorandum by Bean, District Judge:

This is an action by the Government to recover penalties provided by Act of Congress of March 4, 1907 (34 Stat. 1415), known as the Hours of Service

Act. This act makes it unlawful for any common carrier engaged in the transportation of passengers or property from one state to any other state to require or permit a train dispatcher or other employe who, by the use of the telephone or telegraph, transmits, receives or delivers orders pertaining to or affecting train movements, to remain on duty for a longer period than a specific number of hours.

The complaint alleges that defendant is a common carrier within the meaning of this law and charges four violations thereof. By agreement of parties the case was tried by the Court without the intervention of a jury.

The facts are that the defendant is a corporation organized and existing under a law of the State of Oregon for the purpose of engaging in the transportation of timber and lumber, and is required, under the law of its creation, "to afford all persons equal facilities for the transportation of freight upon payment or tender of reasonable transportation therefor." (Lord's Oregon Laws, Sec. 6857-6858.) It owns and operates a railroad from Kerry, a station on the Spokane, Portland & Seattle road, south twenty or twenty-five miles and wholly within the State of Oregon. Its road is used principally for the transpor-

tation of saw logs to the Columbia River, where they are unloaded into the river and from thence transported by water to their destination. It has no agents or stations along its line or at any point thereon except its terminal at Kerry. It has no through rates or traffic arrangements with any other road and no conventional agreement for the division of charges. It issues no bills of lading for carriage beyond its own line, and neither assumes, charges or collects freight for carriage on other lines, nor does it receive and accept goods on through bills of lading from other points consigned to points on its line. Ninety-five per cent, or more of its entire business consists of hauling logs. It does, however, receive and transport a small amount of express and freight from Kerry to parties along its line which comes in over the S. P. & S., some of it from points outside of the state. In such cases the goods are addressed to the consignee at Kerry and waybilled to that point, but by arrangement between the consignees and the defendant company the goods are received by the defendant from the S. P. & S., and transported over its lines, and it receives compensation therefor. This transportation is sometimes in cars of the S. P. & S., for which it is charged demurrage the same as any other shipper.

These cars are sometimes loaded for the return journey with lumber, shingles, etc., destined for points outside of the state and moved by the defendant to Kerry and placed on the tracks of the S. P. & S. In such case the custom is for the shipper, after loading the cars, to make out two sets of shipping orders, one for the movement over the defendant's line and another for the S. P. & S. Co. The train crew of the defendant picks up the cars so loaded, together with the shipping orders, none of which have been signed or approved by any agent or representative of the defendant, takes them in to Kerry, where the order covering the carriage over its road is delivered to its agent and the other placed in a box alongside the S. P. & S. track, from whence it is taken by a freight conductor of that company and, together with the case, moved to the nearest S. P. & S. station having an agent where the bill of lading is signed by such agent and the goods billed and forwarded to their destination.

The question for decision is whether under these facts the defendant is engaged in the transportation of property from one state to another within the meaning of the Hours of Service Act.

It is said that whenever a commodity has begun

to move from one state to another traffic in that commodity has commenced and the fact that several different and independent agencies are employed in the transportation, some acting entirely within one state and some acting through two or more states, does not affect the character of the transportation, whether the goods are carried on through bills of lading or rebilled by the various carriers. (The *Daniel Ball*, 10 Wall. 537; *Ohio R. R. Com. v. Worthington*, 225 U. S. 101; *U. S. vs. C. & N. W.*, 157 Fed. 321; *Pac. Coast R. vs. U. S.* 173 Fed. 448.) But, as said by the Supreme Court in *Cox vs. Errol*:

“This movement does not begin until the articles have been shipped or started for transportation from the one state to the other . . . Carrying it from the farm or the forest to the depot is only an interior movement of the property entirely within the state for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether *in fieri* and not at all a fixed and certain thing.” (116 U. S. 528.)

And such I take it is the effect of the business of the defendant. It is engaged in the carrying of the products of the forest to the depot or station of the S. P. & S. Co., for shipment, and in receiving from that line goods the contract of carriage of which has ended (*Gulf C. & S. F. Ry. vs. Texas*, 204 U. S. 403), and delivering them to the owner. In short the essential character of the defendant's business is that of a forwarding agency. Under the laws of its creation it is a common carrier of freight. As such it must accept and carry over its lines all proper subjects of traffic regardless of whence it comes or its ultimate destination. When freight is offered to it for transportation, no matter by whom offered or where destined, it has no discretion to refuse to carry it, but in my judgment clearly has a legal right and does confine its business to its own lines and is therefore engaged in intra- and not interstate carriage. (*Seattle vs. B. & O.*, 249 Fed. 913; *Gulf D. & S. F. vs. Tex.*, *supra*; *N. Y. Cen. R. R. vs. Mahoney*, decided by Sp. Ct., March 1, 1920.)

It follows that the plaintiff is not entitled to recover and findings and judgment may be prepared accordingly.

AND AFTERWARDS, to-wit, on the 16th day

of August, 1920, there was duly filed in said Court, Findings of Fact and Conclusions of Law, in words and figures as follows, to-wit:

**(FINDINGS OF FACT AND CONCLUSIONS
OF LAW)**

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

<p>THE UNITED STATES OF AMERICA,</p>	<p>Plaintiff,</p>	<p>Findings of Fact and Conclusions of Law.</p>
<p>vs.</p>		
<p>COLUMBIA & NEHALEM RIVER RAILROAD COMPANY,</p>	<p>Defendant.</p>	

This cause came on regularly for trial on the merits, July 15th, 1920, the plaintiff appearing by Chas. W. Reames, Esq., Assistant United States Attorney, and Roscoe B. Walker, Esq., Attorney for the Interstate Commerce Commission, and the defendant appearing by Veazie & Veazie, its attorneys.

By their written waiver on file herein both parties waived jury trial and consented that the case be tried by the Court, without a jury. Thereupon, the Court heard the testimony and evidence offered on behalf of the respective parties, and the arguments of coun-

sel, and took the case under advisement, and being now duly advised, makes the following

FINDINGS OF FACT.

I.

As to the first cause of action set out in the complaint the Court finds that the defendant is not, and was not at any of the times mentioned in the complaint engaged in interstate commerce.

II.

As to the second cause of action set forth in the complaint the Court finds that the defendant is not and was not at any of the times mentioned in the complaint engaged in interstate commerce.

III.

As to the third cause of action set forth in the complaint the Court finds that the defendant is not and was not at any of the times mentioned in the complaint engaged in interstate commerce.

IV.

As to the fourth cause of action set forth in the complaint the Court finds that the defendant is not and was not at any of the times mentioned in the complaint engaged in interstate commerce.

As to the fifth cause of action set forth in the complaint the Court finds that the defendant is not and was not at any of the times mentioned in the complaint engaged in interstate commerce.

From the foregoing findings of fact, the Court makes and states the following

CONCLUSIONS OF LAW.

That the defendant is not subject to the Act of Congress mentioned in the complaint, and that plaintiff is not entitled to recover herein upon either or any of its said causes of action, and that defendant is entitled to a judgment that plaintiff take nothing herein.

Dated this 16th day of August, 1920.

R. S. BEAN,

Judge.

AND AFTERWARDS, to-wit, on the 16th day of August, 1920, there was duly filed in said Court a judgment, in words and figures as follows, to-wit:

(JUDGMENT)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF

AMERICA,

Plaintiff,

vs.

COLUMBIA & NEHALEM RIVER

RAILROAD COMPANY,

Defendant.

} Judgment.

This cause having come on regularly for trial on the 15th day of July, 1920, the plaintiff appearing by Chas. W. Reames, Esq., Assistant United States Attorney, and Roscoe B. Walker, Esq., Attorney for the Interstate Commerce Commission, and the defendant appearing by Veazie & Veazie, its attorneys, and the parties thereto having by their written waiver on file herein waived jury trial, and consented to the trial of the case by the Court without a jury, and the Court having heard the evidence offered by the respective parties and the arguments of counsel, and taken the case under advisement, and having heretofore made and filed its findings of fact and conclusions of law wherefrom it appears that the plaintiff is not entitled to recover upon either or any of the causes of action set forth in the complaint:

NOW THEREFORE based upon the said findings of fact and conclusions of law it is hereby considered ordered and adjudged that the plaintiff take nothing by this action.

Dated this 16th day of August, 1920.

R. S. BEAN,

Judge.

AND AFTERWARDS, to-wit, on Tuesday, the 24th day of August, 1920, the same being the 44th judicial day of the regular July term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

(ORDER EXTENDING TIME)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF
AMERICA,

Plaintiff,

vs.

COLUMBIA & NEHALEM RIVER
RAILROAD COMPANY,

Defendant.

No. L-8609

August 24,
1920.

Now, at this day upon motion of Mr. Austin F. Flegel, Jr., Assistant United States Attorney, it is

ordered that plaintiff be and is hereby allowed 30 days from this date within which to move to set aside the judgment herein, to submit special findings of fact, and to prepare and submit its bill of exceptions herein.

AND AFTERWARDS, to-wit, on Saturday, the 18th day of September, 1920, the same being the 66th judicial day of the regular July term of said Court; present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

(ORDER EXTENDING TIME)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF
AMERICA,

vs.

COLUMBIA & NEHALEM RIVER
RAILROAD COMPANY,
Defendant.

Plaintiff,

No. L-8609

September 18,
1920.

Now at this day upon motion of Mr. Charles W. Reames, Assistant United States Attorney,

IT IS ORDERED that he be and he is hereby

allowed thirty days from September 24, 1920, to file objections to the proposed findings of fact herein.

AND AFTERWARDS, to-wit, on Friday, the 22nd day of October, 1920, the same being the 95th judicial day of the regular July term of said Court; present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

(ORDER EXTENDING TIME)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF AMERICA,	} <div style="display: inline-block; vertical-align: middle; margin-left: 10px;"> No. L-8609 October 22, 1920. </div>
Plaintiff,	
vs.	
COLUMBIA & NEHALEM RIVER RAILROAD COMPANY,	
Defendant.	

Now at this day upon motion of Mr. Charles W. Reames, Assistant United States Attorney,

IT IS ORDERED that he be and he is hereby allowed ninety days from this date to submit a request for special findings herein and to submit a bill of exceptions herein.

AND AFTERWARDS, to-wit, on the 31st day of

December, 1920, there was duly filed in said Court, a request for Findings of Fact, in words and figures as follows, to-wit:

(REQUESTED FINDINGS OF FACT)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF
AMERICA,

Plaintiff,

vs.

COLUMBIA & NEHALEM RIVER
RAILROAD COMPANY,

Defendant.

Comes now Chas. W. Reames, Assistant United States Attorney for the District of Oregon, attorney for the plaintiff in the above entitled case, and respectfully requests that the Court make findings of fact in regard to the following matters:

I.

As to whether the movement of C. & N. W. Car No. 21543, loaded with shingles and consigned from Elwood Siding, Oregon, to Detroit, Michigan, over the lines of the Columbia & Nehalem River Railroad and other railroads, on September 1, 1919, handled

by J. G. Nash, train dispatcher of the Columbia & Nehalem River Railroad at Kerry, Oregon, constituted a movement of trains or the consignment of goods in interstate commerce.

II.

As to whether J. G. Nash, train dispatcher for the Columbia & Nehalem River Railroad at Kerry, Oregon, was permitted to remain on duty for a longer period than nine hours on September 1, 1919, in the 24-hour period, to-wit: from the hour of 6 o'clock a. m., on said date to the hour of 11:50 p. m., on said date, and whether he was employed during that time directing the movement of trains, or a train, engaged in interstate commerce, and whether or not the remaining upon duty of said train dispatcher on September 1, 1919, as stated, was a violation of the Hours of Service Act.

III.

As to whether the shipment over the line of the Columbia & Nehalem River Railroad and other lines of Car No. 287591, initialed P. R. R., containing ties from Birkenfeld, Oregon, to Chicago, Illinois, handled by J. G. Nash, train dispatcher of the Columbia & Nehalem River Railroad, on September 9, 1919, constituted a movement of trains, or a train, engaged

in interstate commerce, or the shipment of goods in interstate commerce.

IV.

As to whether Car No. 76885, initialed C. & N. W., loaded with lumber shipped from Birkenfeld, Oregon, to Springfield, Illinois, handled by Train Dispatcher J. G. Nash of the Columbia & Nehalem River Railroad at Kerry, Oregon, on Sept. 9, 1919, and shipped over the Columbia & Nehalem River Railroad and other railroads, constituted a movement of a train or trains, or the shipment or consignment of goods in interstate commerce.

V.

As to whether J. G. Nash, train dispatcher at Kerry, Oregon, of the Columbia & Nehalem River Railroad, was permitted to work and remain on duty more than nine hours in the twenty-four hour period in which he was then employed, on September 9, 1919, and whether he was engaged in the directing of trains and dispatching of trains engaged in interstate commerce, or carrying articles which were shipped in interstate commerce.

VI.

As to whether the movement of Car No. 20098, initialed NW, loaded with lumber consigned from

Birkenfeld, Oregon, to Sheridan, Wyoming, over the Columbia & Nehalem River Railroad and other railroads, handled by J. G. Nash at Kerry, Oregon, on November 2, 1919, constituted a movement of a train or trains in interstate commerce, or the shipment or consignment of goods in interstate commerce or forming a part of interstate commerce.

VII.

As to whether J. G. Nash, train dispatcher of the Columbia & Nehalem River Railroad at Kerry, Oregon, was permitted by the Columbia & Nehalem River Railroad to remain on duty more than nine hours in the twenty-four hour period in which he was employed on November 22, 1919, and whether he was engaged in dispatching trains engaged in interstate commerce, or carrying articles forming a part of interstate commerce in violation of the Hours of Service Act.

VIII.

As to whether Car No. 2242, initialed C. & E. I., loaded with shingles consigned from M. J. Campbell Lumber Company, Elwood, Oregon, to Ventura, California, on November 5, 1919, handled by J. G. Nash, train dispatcher of the Columbia & Nehalem River Railroad at Kerry, Oregon, constituted a move-

ment of a car or cars engaged in interstate commerce, and whether it constituted a shipment of articles in interstate commerce.

IX.

As to whether J. G. Nash, train dispatcher of the Columbia & Nehalem River Railroad at Kerry, Oregon, was permitted to work more than nine hours in the twenty-four hour period in which he was employed on November 5, 1919, at Kerry, Oregon, and whether he was then engaged in handling cars engaged in interstate commerce or dispatching cars carrying articles forming a part of interstate commerce.

X.

As to whether Car No. 72682, initialed LV, containing shingles consigned from Nehalem Camp, Oregon, to Cheyenne, Wyoming, over the Columbia & Nehalem River Railroad and other railroads, handled by Train Dispatcher J. G. Nash of the Columbia & Nehalem River Railroad at Kerry, Oregon, on November 15, 1919, constituted a train engaged in interstate commerce, or the shipment or consignment of articles forming a part of interstate commerce.

XI.

As to whether Train Dispatcher J. G. Nash of the Columbia & Nehalem River Railroad at Kerry, Oregon, was permitted on November 15, 1919, to work more than nine hours in the said twenty-four hour period on the said day on which he was employed and whether he was engaged in dispatching trains engaged in carrying articles forming a part of interstate commerce and whether he was engaged in dispatching trains engaged in interstate commerce and whether the working of J. G. Nash on said November 15, 1919, constituted a violation of the Hours of Service Act.

XII.

As to whether the shipment and consignment of express packages of the Columbia & Nehalem River Railroad from points along the line of the Columbia & Nehalem River Railroad in the State of Oregon, to points outside of the State of Oregon and over other railroads, constituted the carrying of articles forming a part of interstate commerce.

XIII.

As to whether the receipt of articles shipped from points outside of the State of Oregon, over other railroads than the Columbia & Nehalem River Rail-

road, by the Columbia & Nehalem River Railroad within the State of Oregon, to be delivered and transmitted by said Columbia & Nehalem River Railroad to points along the line of said railroad, constituted the carrying of articles forming a part of interstate commerce.

XIV.

As to whether the receiving of articles which had been shipped in interstate commerce over other railroads than the Columbia & Nehalem River Railroad by the Columbia & Nehalem River Railroad indiscriminately as to whether the articles came from outside the State of Oregon, or within the State of Oregon, but were actually shipped from points outside the State of Oregon, constituted the carrying of articles forming a part of interstate commerce.

Respectfully submitted,

CHAS. W. REAMES,

Assistant United States Attorney.

At this time the court declines to make the foregoing findings as requested to which ruling the plaintiff duly excepts which exception is hereby allowed.

Dated December 13th, 1920.

R. S. BEAN,
Judge.

AND AFTERWARDS, to-wit, on Wednesday, the 19th day of January, 1921, the same being the 67th judicial day of the regular November term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

(ORDER EXTENDING TIME)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF AMERICA,	} Plaintiff,	No. L-8609
vs.		
COLUMBIA & NEHALEM RIVER RAILROAD COMPANY,	} Defendant.	January 19, 1921.

Now at this day upon motion of Mr. Thomas H. Maguire, Assistant United States Attorney.

IT IS ORDERED that he be and he is hereby allowed fifteen days from this date to file his bill of exceptions herein.

AND AFTERWARDS, to-wit, on Friday, the 4th day of February, 1921, the same being the 81st judicial day of the regular November term of said Court; present the Honorable Robert S. Bean, United

States District Judge, presiding, the following proceedings were had in said cause, to-wit:

(ORDER EXTENDING TIME)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF
AMERICA,

Plaintiff,

vs.

COLUMBIA & NEHALEM RIVER
RAILROAD COMPANY,
Defendant.

No. L-8609

February 4,
1921.

Now at this day upon motion of Mr. Thomas H. Maguire, Assistant United States Attorney.

IT IS ORDERED that he be and he is hereby allowed to Saturday, February 12, 1921, to submit his bill of exceptions herein.

AND AFTERWARDS, to-wit, on the 15th day of February, 1921, there was duly filed in said Court, a Petition for Writ of Error, in words and figures as follows, to-wit:

(PETITION FOR WRIT OF ERROR)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF

AMERICA,

Plaintiff,

vs.

COLUMBIA & NEHALEM RIVER

RAILROAD COMPANY,

Defendant.

Petition for
Writ of
Error.

To the Honorable Robert S. Bean, Judge of the
Above Entitled Court:

Comes now the United States of America, the
plaintiff herein, by Thos. H. Maguire, Assistant
United States Attorney for the District of Oregon,
and respectfully shows that on the 16th day of
August, 1920, judgment in the above entitled cause
was entered in favor of the defendant herein and
against your petitioner.

Your petitioner, feeling itself aggrieved by said
order entering judgment in favor of said defendant
in which proceeding certain errors were committed
to the prejudice of the plaintiff, all of which will more
fully appear from the Bill of Exceptions and Assign-
ments of Error filed with this petition, does herewith

petition the Honorable Court for an Order allowing your petitioner to prosecute a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules and laws of the United States in such case made and provided.

Wherefore your petitioner prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of and that an order be made staying all further proceedings until the determination of such Writ of Error by said Circuit Court of Appeals and that a transcript of the records, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Portland, Oregon, this 14th day of February, 1921.

UNITED STATES OF AMERICA.

By THOS. H. MAGUIRE.

Assistant United States Attorney
for the District of Oregon.

STATE OF OREGON,)
County of Multnomah,) ss.

Due legal and timely service of the foregoing

petition for Writ of Error is hereby acknowledged by receipt of a copy thereof at Portland, Oregon, this 15th day of February, 1921.

WILBUR, BECKETT & HOWELL,

Attorneys for Defendant.

AND AFTERWARDS, to wit, on the 15th day of February, 1921, there was duly filed in said Court, an Assignment of Errors in words and figures as follows, to wit:

(ASSIGNMENT OF ERRORS)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON
THE UNITED STATES OF
AMERICA,

Plaintiff,

vs.

COLUMBIA & NEHALEM RIVER
RAILROAD COMPANY,

Defendant.

Assignment
of Errors.

The United States of America, the plaintiff in error herein, having petitioned for an order from said Court permitting a Writ of Error from this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit from the final order and judgment made and entered in said cause against said Plaintiff in Error and petitioner herein, now

makes and files with said petition the following Assignments of Error upon which it will rely for a reversal of said final order and judgment upon the said Writ and which said errors and each and every one of them are to the great detriment, injury and prejudice of said defendant, and said defendant says that in the records and proceedings upon the hearing and determination thereof in the District Court of the United States for the District of Oregon, there are manifest errors in this, to-wit:

I.

That the Court erred in overruling the motion of plaintiff for a judgment upon the testimony.

II.

That the Finding of Fact as to the first cause of action is not sustained by the evidence adduced at the trial of the above entitled cause and the Court erred in making the said finding.

III.

That the Finding of Fact as to the second cause of action is not sustained by the evidence adduced at the trial of the above entitled cause and the Court erred in making the said finding.

IV.

That the Finding of Fact as to the third cause of action is not sustained by the evidence adduced at the trial of the above entitled cause and the Court erred in making the said finding.

V.

That the Finding of Fact as to the Fourth cause of action is not sustained by the evidence adduced at the trial of the above entitled cause and the Court erred in making the said finding.

VI.

That the Finding of Fact as to the fifth cause of action is not sustained by the evidence adduced at the trial of the above entitled cause and the Court erred in making the said finding.

VII.

That the Finding of Fact as to the first cause of action is not sustained by law and the Court erred in making the said finding.

VIII.

That the Finding of Fact as to the second cause of action is not sustained by law and the Court erred in making the said finding.

IX.

That the Finding of Fact as to the Third cause of action is not sustained by law and the Court erred in making said finding.

X.

That the Finding of Fact as to the fourth cause of action is not sustained by law and the Court erred in making said finding.

XI.

That the Finding of Fact as to the fifth cause of action is not sustained by law and the Court erred in making said finding.

XII.

That the Court erred in declining to make the first Finding of Fact as requested by plaintiff.

XIII.

That the Court erred in declining to make the second Finding of Fact as requested by plaintiff.

XIV.

That the Court erred in declining to make the third Finding of Fact as requested by plaintiff.

XV.

That the Court erred in declining to make the

fourth Finding of Fact as requested by plaintiff.

XVI.

That the Court erred in declining to make the fifth Finding of Fact as requested by plaintiff.

XVII.

That the Court erred in declining to make the sixth Finding of Fact as requested by plaintiff.

XVIII.

That the Court erred in declining to make the seventh Finding of Fact as requested by plaintiff.

XIX.

That the Court erred in declining to make the eighth Finding of Fact as requested by plaintiff.

XX.

That the Court erred in declining to make the ninth Finding of Fact as requested by plaintiff.

XXI.

That the Court erred in declining to make the tenth Finding of Fact as requested by plaintiff.

XXII.

That the Court erred in declining to make the eleventh Finding of Fact as requested by plaintiff.

XXIV.

XXV.

THOS. H. MAGUIRE,

STATE OF OREGON,)
) ss.
County of Multnomah,)

Due, legal and timely service of the foregoing As-

signment of Errors is hereby acknowledged by receipt of a copy thereof at Portland, Oregon, this 15th day of February, 1921.

WILBUR, BECKETT & HOWELL,
Attorneys for defendant.

AND AFTERWARDS, to-wit, on Tuesday, the 15th day of February, 1921, the same being the 90th judicial day of the regular November term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

(ORDER ALLOWING WRIT OF ERROR)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF AMERICA,	} Order Allowing Writ of Error.
Plaintiff,	
vs.	
COLUMBIA & NEHALEM RIVER RAILROAD COMPANY,	
Defendant.	

NOW AT THIS TIME comes the plaintiff in the above entitled cause, by Thos. H. Maguire, Assistant United States Attorney, and presents to the Court its petition praying for the allowance of a Writ of Error

AND AFTERWARDS, to wit, on the 15th day of February, 1921, there was issued out of said Court a Citation on Writ of Error in words and figures, as follows, to wit:

(CITATION ON WRIT OF ERROR)

IN THE DISTRICT COURT OF THE UNITED
..STATES FOR THE DISTRICT OF OREGON.

UNITED STATES OF
AMERICA,

Plaintiff,

vs.

COLUMBIA & NEHALEM RIVER
RAILROAD COMPANY,

Defendant.

UNITED STATES OF AMERICA,)
District of Oregon,) ss.

To COLUMBIA & NEHALEM RIVER RAIL-
ROAD COMPANY, Defendant above named
and Defendant in Error, and WILBUR, BECK-
ETT & HOWELL, its attorneys, GREET-
INGS:

YOU ARE HEREBY CITED and ADMON-
ISHED to be and appear before the United States

Writ of Error in words and figures, as follows, to-wit:

(WRIT OF ERROR)

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH DISTRICT.

THE UNITED STATES OF		} Writ of Error.
AMERICA,	Plaintiff,	
vs.		
COLUMBIA & NEHALEM RIVER		
RAILROAD COMPANY,	Defendant.	

THE UNITED STATES OF AMERICA.—ss.
THE PRESIDENT OF THE UNITED
STATES OF AMERICA.

To the Judge of the District Court of the United
States for the District of Oregon:

GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean one of you, between United States of America Plaintiff and Plaintiff in Error, and Columbia & Nehalem River Railroad Company, Defendant and Defendant in Error, a manifest error hath happened to

the great damage of said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE EDWARD
DOUGLAS WHITE,
Chief Justice of the Supreme Court of the United
States, this 15th day of February, 1921.

(Seal) G. H. MARSH,
Clerk of the District Court of the United
States for the District of Oregon.

AND AFTERWARDS, to wit, on the 5th day of March, 1921, there was duly filed in said Court, a Bill of Exceptions in words and figures as follows, to wit:

(BILL OF EXCEPTIONS)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

THE UNITED STATES OF AMERICA,	} Bill of Exceptions.
Plaintiff,	
vs.	
COLUMBIA & NEHALEM RIVER RAILROAD COMPANY,	} Bill of Exceptions.
Defendant.	

BE IT REMEMBERED that on the 15th day of July, 1920, a day of the regular July term of the above entitled Court beginning and held at Portland, Oregon, the Honorable Robert S. Bean, District Judge, presiding, the above entitled cause came on to be heard before said Court, the parties thereto, by their written waiver and stipulation on file herein, having waived a jury trial, the plaintiff appearing by Chas. W. Reames, Assistant United States Attorney, and Roscoe B. Walters, attorney for the Interstate Commerce Commission, and the defendant appearing by Veazie & Veazie, its attorneys,

EXCEPTION NO. I.

Whereupon the following proceedings were had:
CASSIUS CLAY COCHRAN being called as a witness for the plaintiff and, being first duly sworn, testified as follows:

That he is and has been since prior to September 1, 1919, auditor of the Columbia & Nehalem River Railroad Company, defendant herein and, as auditor, has access to the records of the said defendant, and is familiar with the methods of business and operation of said Railroad. That a certain shipping order, dated September 1, 1919, covering a car designated as N. W. 21543, loaded with shingles, consigned to M. J. Campbell Lumber & Shingle Company, per M. J. Campbell, at Elwood Siding, Oregon, to M. J. Campbell Lumber & Shingle Company, at Kerry, Oregon, which was offered in evidence and marked "Complainant's Exhibit 1," and a certain shipping order, dated September 9, 1919, covering a car designated as P. R. R. 287591, loaded with railroad ties consigned by Fred Beer Lumber Company, per Sam Beer, to Penn Line West, at Chicago, from Birkenfeld, Oregon, which was offered in evidence and marked "Complainant's Exhibit 2," and a shipping order, dated September 6, 1919, covering a car designated as C. & N. W. 76885, loaded

with lumber consigned by Gustina Bros., per G. Gustina, at Birkenfeld, Oregon, to St. Louis & San Francisco Railroad, at Springfield, Missouri, which was offered in evidence and marked "Complainant's Exhibit 3," and shipping order dated November 1, 1919, covering a car designated as N. W. 20098, loaded with lumber, consigned by Fred Beer Lumber Company, per Sam Beer, at Birkenfeld, Oregon, to C. B. & Q. R. R., at Sheridan, Wyoming, which was offered in evidence and marked "Complainant's Exhibit 5," and shipping order, dated November 8, 1919, covering a car designated as C. & E. I. 2242, loaded with shingles, consigned by M. J. Campbell Lumber & Shingle Company, per David Scott, at Campbell Mills, known to defendant corporation as Elwood Siding, to the same consignor at Kerry, Oregon, which was offered in evidence and marked "Complainant's Exhibit 6," and shipping order, dated November 14, 1919, covering a car designated as L. V. 72682, loaded with shingles, consigned by W. F. Turner, at Nehalem Camp, Oregon, to Coast Fir & Lumber Company, at Cheyenne, Wyoming, which was offered in evidence and marked "Complainant's Exhibit 4," were duplicate bills of lading from the files of the defendant corporation.

That in the ordinary course of business, the ship-

per, when the loaded car was sent to the assembling point, sent with it, in case the shipment was destined for some point beyond the lines of defendant, one bill of lading for the defendant, covering carriage from the point of origin to Kerry, the terminus of defendant's line, and a separate bill of lading covering the carriage of shipment from Kerry to destination over the Spokane, Portland & Seattle Railroad lines, the only railroad connecting with defendant's line, and other roads. Both bills would always be made out by the shipper and were brought by the train crew to defendant's offices, at Kerry, where the agent of defendant would file the Columbia & Nehalem bill, note the final destination of shipment as shown by the accompanying S. P. & S. bill, and deposit the S. P. & S. bill in a small box, provided for that purpose, near the S. P. & S. station. The car containing the shipment would then be left on a spur of the S. P. & S., at Kerry. The conductor of the next east bound freight train of the S. P. & S. would stop and get the S. P. & S. billing from the box, pick up the corresponding car from the spur, and take the bill and car to Clatskanie, the next station east of Kerry on the S. P. & S., where the S. P. & S. agent would prepare waybills from Kerry to destination. No agent was maintained by the S.

P. & S. at Kerry. No agreement existed between defendant and the S. P. & S. governing general routing, general rates, or division of rates, or any other joint arrangement. Cars coming in on the line of defendant, loaded with freight from the S. P. & S., were handled the same as in the case of an ordinary shipper. A demurrage rate was charged defendant by the S. P. & S. No per diem arrangement existed. Several times, however, through the inadvertence of defendant's employees and of shippers, the shipping order for defendant corporation showed the final destination to be beyond the lines of the defendant, instead of showing it as Kerry, Oregon. Train crews and agents had been instructed not to accept bills of this kind, but when they had been accepted in that form, a notation was always made upon the arrival of the billing at Kerry, giving the point of origin on defendant's line and showing Kerry as the final destination. The reason that the defendant demanded separate bills of lading is that the defendant cannot properly receipt on bills of lading and return them to shipper if the carriage described in bill of lading does not terminate at Kerry. The defendant receives shipments originating on its lines, regardless of whether final destina-

tion is in the State of Oregon. The shipper deals directly with the S. P. & S. concerning transportation of shipments from Kerry to final destination. Logs constitute 95 per cent of the freight taken over the defendant's lines. Practically, all of the freight delivered to the defendant by the S. P. & S., at Kerry, for shipment over defendant's lines, originates at points within the State of Oregon. That he estimates that between 40 and 50 per cent of carload shipments other than logs, originating at points on defendant's lines, are destined for points outside the State of Oregon. That he estimates that the amount of business that the S. P. & S. receives at Kerry for transportation outside the State of Oregon would not exceed 1 per cent of the total business of the defendant. Movements of general freight ordinarily take place two or three times a week so as not to interfere with the logging traffic.

That during September and November, 1919, the defendant carried United States mail, free of charge, and no record was kept of it. All mail destined for points on defendant's lines was addressed to Kerry, Oregon, and separated by the Postmaster there, placed in sacks, addressed to different camps along the defendant's line, and turned over to defendant for delivery.

That the defendant carried express to and from points along the line. Upon express packages arriving at Kerry addressed to consignee, located on defendant's line, a separate express bill would be made out and separate payment would be made to the defendant for carriage from Kerry to destination. The method of handling and accounting for express was similar to that of handling and accounting for freight. No shipments were made either to or from points on defendant's line on through express bills. All express arriving from outside points were addressed to the consignee, at Kerry, and then were rebilled over the lines of defendant. That he believes that Sears, Roebuck & Co., and Montgomery Ward & Co. have sent express packages to consignees on defendant's line. That defendant possesses no other freight cars except three flat cars and one stock car. That all of the shipments shown on Complainant's Exhibits, One to Six, inclusive, were loaded on foreign cars.

Whereupon DON J. TERPENING was called as a witness for plaintiff, and, being first duly sworn, testified as follows:

That he is, and has been since June 15, 1920, station agent of the S. P. & S. Railway, at Clatskanie, Oregon, and by virtue of such employment has ac-

cess to the records of the said railway kept at Clatskanie. That shipping order, dated August 31, 1919, covering a car designated as N. W. 21543, loaded with shingles, consigned by M. J. Campbell Lumber & Shingle Company, per M. J. Campbell, from Kerry, Oregon, to Coast Fir & Lumber Company, at Detroit, Michigan, which was offered in evidence and marked "Complainant's Exhibit 7," and a shipping order, dated September 9, 1919, covering a car designated as P. R. R. 287591, loaded with railroad ties, consigned by Fred Beer Lumber Company per Samuel Beer, from Birkenfeld, Oregon, to Penn Line West, Care of C. W. Cushing, C. E. M., at Chicago, Illinois, offered in evidence and marked "Complainant's Exhibit 8" and a shipping order, dated September 9, 1919, covering a car designated as C. & N. W., 76885, loaded with lumber, consigned by Gustina Bros., per G. Gustina, no originating point being designated, to St. Louis & San Francisco Railroad, Care of E. Price, at Springfield, Missouri, which was offered in evidence and marked "Complainant's Exhibit 9," and shipping order, dated November 1, 1919, covering a car designated as N. W. 20098, loaded with lumber consigned by Fred Beer Lumber Company, per Samuel Beer, at Birkenfeld, Oregon, to C. B. & Q. R. R.,

care of Storekeeper, at Sheridan, Wyoming, which was offered in evidence and marked "Complainant's Exhibit 10," and shipping order, dated November 8, 1919, covering a car designated as C. & E. I. 2242, loaded with shingles, and consigned by M. J. Campbell Lumber & Shingle Co., per David Scott, at Kerry, Oregon, to Hooper & Smith, at Ventura, California, which was offered in evidence and marked "Complainant's Exhibit 11," and a shipping order, dated November 14, 1919, covering a car designated as L. V. 72682, loaded with shingles, consigned by W. F. Turner, at Nehalem Camp, Oregon, to Coast Fir Lumber Company, at Cheyenne, Wyoming, which was offered in evidence and marked "Complainant's Exhibit 12," were all records of the S. P. & S., kept at Clatskanie, Oregon. That in the ordinary course of business, the cars mentioned therein were received and carriage was made by the S. P. & S. from Kerry, Oregon, on or about the dates set forth therein. That all points of origin, other than Kerry, Oregon, set forth in the said Exhibits are located upon the line of the defendant. That those bills or shipping orders showing any other originating point than Kerry were incorrectly made out, as the only point of receipt of freight from any points on defendant's lines was at Kerry. That

Exhibits 7 and 12, inclusive, and all cars and shipments referred to therein, were, in the ordinary course of business, picked up by an S. P. & S. freight conductor, at Kerry, and brought to Clatskanie, where the agent receipted the bill of lading, prepared waybills, and sent the freight on its way.

Whereupon J. GRANT NASH was called as a witness for the plaintiff, and being first duly sworn, testified as follows:

That he is, and has been for the past 15 months, employed by defendant corporation as train dispatcher at Kerry, Oregon. His duties were those usually assigned to a train dispatcher. That he has access to the train sheets and records of trains' movements of defendant corporation kept at Kerry, Oregon. That the defendant operates a single track line. That in 1919, there were two passing tracks. That the system followed by the defendant was to assemble all trains at Thompson Siding, by means of switch engines that ran to all the logging camps, and collected cars at the assembling point. That when a full train was assembled, the train movement would be started. That passenger cars consisting of automobiles adapted to railroad track use, are numbered on all train sheets in the order of their arrival, odd num-

bers showing North bound, and even numbers showing South bound trains. Logging trains are designated by the engine numbers. That passenger trains only were governed by schedules, no regular schedules of logging or freight trains being maintained. That Complainant's Exhibit 13 is a train sheet showing movements of trains over defendant's lines on September 1, 1919, between Kerry and Sunnyside. That Exhibit does not show the first order given that date, as it is a standing order for No. 1 to leave Sunnyside at 5:45 A. M. and proceed to Nehalem Junction, where witness usually picks them up between 6:30 A. M. and 6:45 A. M. On September 1, 1919, No. 1 left Sunnyside at 6 A. M., which information was obtained, and noted on train sheet later that day. That he was on duty, dispatching trains, on September 1, 1919, from between 6 and 6:30 A. M. to 10:35 P. M. That he made a check mark opposite the time of the last order given, which order was given to No. 117, which cleared from Kerry for Thompson Siding at 10:35 P. M., arriving there at 11:50 P. M. After No. 117 had cleared Kerry, no further orders were needed, so witness retired. On September 1, 1919, a car designated as N. W. 21543, containing shingles consigned to Detroit, Michigan, was handled

over defendant's line, on train No. 118, arriving at Kerry at 7:50 P. M. That on that date ten trains ran each way on the main line, and two trains on branch service between Thompson Siding and Nehalem Camp, for the purpose of picking up logs, making a total of 22 trains. That Complainant's Exhibit 14 is a train sheet, showing movements on defendant's line on September 9, 1919, between Kerry and Sunnyside. That Exhibit shows that No. 1 left Sunnyside at 5:55 A. M., but that witness was not on duty until 6:30 A. M. That he stayed on duty until 9:45 P. M., as shown by check mark opposite the time of the last order. On that date there were 22 main line movements, and two branch line movements. On that date a car designated at P. R. R. 287591, containing ties consigned to Chicago by Fred Beer Company, and car designated as C. & N. W. 76885, containing lumber consigned to Springfield, Missouri, by Gustina Bros., were handled over defendant's line, car 287591 arriving on No. 117 at Kerry at 4:45 P. M., and car 76885 arriving at Kerry on train No. 117 at 9:40 A. M. That Complainant's Exhibit 15 is a train sheet showing movements of trains on defendant's line on November 2, 1919. That he went on duty at usual hour of about 6:30 A. M., and went off duty at

12:10 A. M. the following morning. That 26 trains were moved on that date. That car designated as N. W. 20098 containing lumber consigned to Sheridan, Wyoming, by the Beers Company was handled by defendant on that date, arriving at Kerry on train 117, at 10:20 P. M. That Complainant's Exhibit 16 is a train sheet showing movements on defendant's lines on November 5, 1919. That on that date he went on duty about 6:30 A. M., and went off duty at 12:15 A. M. the following morning. That on that date a car designated as C. & E. I. 2242 went out on the defendant's line for loading. That a car designated as B. & O. 92002, containing shingles consigned to California, and a car designated as Penn. 925234, containing lumber consigned to Illinois, by Gustina Bros. were handled on that date, car 92002 arriving at Kerry on train 117 at 4:45 P. M., and car 925234 arriving at Kerry on train 117 at 11:30 A. M. That Complainant's Exhibit 17 is a train sheet showing movements on defendant's line on November 15, 1919. That he was on duty on that date from about 6:30 A. M. to 9:20 P. M. On that date a car designated as L. V. 72682 containing shingles consigned to Cheyenne, Wyoming, was handled over defendant's line, arriving at Kerry on train No. 119 at 9:30 A. M. That on all of

the dates mentioned in the foregoing Exhibits, he was awakened by an alarm clock at 6 A. M., and arrived at the office for duty within a half hour. That each night as soon as he was certain that a train had a clear track and had cleared all points from which a report was necessary, he retired. There were a superintendent and trainmaster at Thompson Siding, where they had the same telephone connection as the witness, and it was usually possible for them to keep track of and handle trains after 6 P. M., but it was not customary and witness preferred to keep all dispatching under his own control. That he had no contract or understanding as to hours of work. That when he left Kerry, ordinarily the superintendent or the auditor, did the dispatching. That during the fall of 1919 it was impossible, as a rule, to close the office before 9 or 10 P. M., at the earliest, as there were generally trains at Kerry at that hour that were unloading that could not be reached by telephone at the place of unloading, so it was necessary for them to come to the office for orders. That there is practically no town at Kerry. There is a scow boat there that takes in roomers at night and at which the employees of the railroad get some of their meals but other than that there is simply a small combination store and post office. That he

slept in the same building where his office is, his sleeping room being upstairs over the dispatcher's office and the only place in the building where there is a stove is in the dispatcher's office and he uses the office as a sort of a living room and generally sits in the office and reads the paper and smokes after supper as there are no amusements of any kind at Kerry. That he generally spent his evenings in the office whether there were any trains on the line or not and would shave and make his toilet in the office rather than in his bedroom upstairs. That the jitney which carried passengers would leave Sunnyside at 5:45 on an understood or standing order and that logging trains which were the first trains that started in the morning that would require orders would not get started until 7:00 o'clock or after. That he got the information which he noted on the train sheets as to the final destination of cars from the S. P. & S. bill of lading. That owing to the character of the business which the defendant was engaged in, there was no regular schedule or running time for any of the logging trains. That he has taken a pride in keeping the dispatching of these trains under his own control and through a sense of responsibility or pride has kept a pretty tight rein on the dispatching and rather re-

sented the idea of any one assisting him in dispatching. That an examination of the train sheets will show that four out of five are orders which he gave trains going south and not trains out on the line, these orders being given principally to trains that came into Kerry to unload their logs and were going back to Thompson Siding. That after the logging trains would come into Kerry, it would take them about two hours to unload. That although there were no other trains on the line, he would not give the train crew orders to proceed back to Thompson Siding when they arrived at Kerry for unloading but would wait until the train crew had finished unloading and would then give them running orders. That even though he knew there were no other trains on the line he thought it would be taking a chance to give the crew an order to proceed back to Thompson Siding to tie up for the night several hours before they were to start and that he considered that he was on duty during this time.

That during the rainy season in the fall of 1919 defendant's track was not in very good condition due to lack of ballast and it was on this account that trains were frequently late and that when things are running smoothly and the track in good condition in the ordi-

nary operations of the road, the logging trains would be tied up by 8:00 in the evening, the ordinary movement of trains thus taking place from 7:00 in the morning until 8:00 at night. That when commercial cars were brought into Kerry from shippers along the defendant's line, they were ordinarily simply hitched onto one of the logging trains.

Whereupon, the plaintiff rested, and defendant, by its attorney, moved for a non-suit upon the grounds that the plaintiff had not shown that the defendant was engaged in interstate commerce, and that it had not been shown by the plaintiff that the Railroad was being operated continuously day and night within the meaning of the statute and the allegations of the complaint, upon which motion the court reserved its ruling.

Whereupon, defendant offered in evidence copies of defendant's Articles of Incorporation, marked "Defendant's Exhibit A" and Supplementary Articles of Incorporation marked "Defendant's Exhibit B," both duly authenticated and certified by the County Clerk of Multnomah County, Oregon.

Whereupon, A .S. KERRY was called as a witness on behalf of the defendant, and, being first duly sworn, testified as follows:

That he is President and General Manager of the Columbia & Nehalem River Railroad Company. That the defendant's line starts in the State of Oregon, in Columbia County, about one mile from the Clatsop County line, on a slough that runs into the Columbia River. That it taps the Nehalem Valley Timber Belt. That the original intention of the incorporators of the road, which was started about six years ago, was to haul their own timber, but they found they could not get in without hauling timber for others, so incorporated as a common carrier. That the defendant Railroad is primarily a logging railroad, the curvature and grade being heavy, but the construction not as expensive as that of an ordinary railroad. That during the past year and a half, the road has been running over capacity, because the law compels it to accept all traffic, so that now it carries 60 per cent of the commercial logs used on the Columbia River.

That all of the logging trucks belong to loggers along the line. The defendant's own equipment consists of eight locomotives, three flat cars, one locomotive crane, one steam shovel, and two dump cars.

That defendant was not originally incorporated, or intended as a passenger carrier. That it carried

passengers during the first year free of charge, but later put on automobiles converted to railroad use as passenger cars, and made a charge for hauling.

That defendant has no physical contract with any other road, save the S. P. & S. at Kerry, the northern terminus of defendant's line. That no arrangement existed with the S. P. & S. for interchange of cars. That defendant was treated the same as a shipper, that is, was allowed 48 hours to unload and clear a car, after which time demurrage was charged. The S. P. & S. had no per diem agreement as to use of cars; no arrangement for routing of inbound traffic from the S. P. & S. to points on defendant's line, nor for routing outgoing freight over the S. P. & S., or other lines beyond Kerry; no arrangements for joint rates on freight or any traffic, nor for division of rates. Employees of defendant were instructed to confine the billing and handling of freight strictly to defendant's line. When separate bills of lading for S. P. & S. shipments were brought to Kerry, the defendant and its agents acted simply as a messenger for the consignor.

Besides the dispatcher, Mr. Nash, defendant employed a Superintendent and a trainmaster, who could have taken care of dispatching. They were stationed at Thompson Siding. They had been instructed that

if a telephone call for the dispatcher should be repeated without the dispatcher answering, either one of them should answer the phone and dispatch train. It was not difficult for anyone to keep track of trains, as there were only two passing tracks, one at the south end of a tunnel ten miles from Kerry, and one five miles from Kerry. There is a telephone at both passing tracks, and at the tunnel. Trains were usually made up at Thompson Siding, and a double train started towards Kerry. Train No. 118 would lay over at Kerry and run single, ordinarily meeting double train at the passing tracks. The passenger car ordinarily leaves Sunnyside at 6 A. M. When Nash was first employed in the Spring of 1919, the passenger conductor would report at Nehalem Junction, but now reports at Thompson Siding at 7 A. M., passes ahead of the logging traffic and meets No. 118 at the tunnel or further passing track. That the conductor needed no orders or clearance from Nash to pass Thompson Siding. Standing orders existed to precede all logging traffic; therefore, specific orders were not necessary until the tunnel was reached. Train No. 118 never leaves the tunnel until the double train passes. That there is a written rule to be invoked if the telephone wires are down, providing that he must wait

there for that meeting. After the meet, No. 118 goes to Thompson Siding and the double train to Kerry. That the passenger car made two round trips daily; that the schedule brought him to Kerry at 4:30 P. M. and back to Sunnyside at 7 P. M. However, this schedule was sometimes delayed, according to conditions, as late as 9:30 P. M. That the ordinary daily operations of a logging train extended from 7 A. M. to 6 P. M. In 1919 conditions were bad, and the service variable, owing to the volume of business and inadequacy of equipment. Trains would be delayed from 15 to 20 per cent of the time. If no wrecks or mishaps occurred, trains were generally tied up around 7 P. M., except twice a week, when way freight was hauled. That on those occasions a switch engine would arrive at Kerry after the logging movements had ceased, to pick the freight up and deliver it along the line. That no dispatching was necessary for such movements, as the track was clear. On occasions when Train No. 118 was late at Kerry, holding up 117 and 119, which could not leave until its arrival, the dispatcher could have earlier in the evening given 117 and 119 orders to move upon the arrival of 118, instead of waiting for the actual arrival. However, the passenger car

scheduled to leave Kerry at 4:30 P. M. was often held up by incoming trains until as late as 9 P. M. The conductor of that train got his information as to the conditions of the line and his orders to move from Nash. That he does not believe that Nash performed any duty for the defendant after 8 P. M. at any time. That Nash stayed in the office evenings, but did no necessary work. In the evenings if train crews would call Nash to notify him that they were tied up for the night or that they had passed certain points, Nash would answer the phone and receive the report; but witness does not think it was necessary for them to call, and does not think as a matter of fact they did call him. That Nash frequently stayed up until all train reports were in. That witness did not wish Nash to remain in the office as much as he did, and had once proposed hiring another man to assist him, but Nash objected so that the man was not hired. That Nash's services were satisfactory. That a certain time table dated March 1, 1920, offered in evidence and marked "Defendant's Exhibit C" is the same as was in effect during the year 1919, except that in 1919 the first train left Sunnyside at 6 A. M., and one passenger car made two round trips. That the predecessor of Nash always closed the office at

G P. M. That no other logging railroad along the Columbia River employs a dispatcher. That the traffic on the line is very sporadic and it is impossible to maintain any regular train schedules other than for the passenger cars. That the only station on the defendant's line where an agent is maintained is at Kerry. That 95 per cent of the total amount of traffic on the road constitutes shipments of logs and all of the logs are dumped into the Columbia River at Kerry. That it is the duty of the train master and the superintendent to make up the trains at Thompson Siding and to lend any assistance in getting the trains over the road that is necessary and the superintendent is on the same line of telephone that Mr. Nash is on and when Mr. Nash is called, the telephone also rings in the superintendent's office and in case Mr. Nash does not answer the telephone or is away, the train master or the superintendent answers it and dispatch the trains and the superintendent and train master keep track of most of the trains' moves so that they are in position to dispatch trains whenever necessary. That he believes that the train sheets are absolutely wrong as to the time Mr. Nash worked. That Nash uses the office as a sitting and living room and is in the office there all the time ex-

cept when he goes upstairs to sleep, whether he is on duty or not.

That on occasions when wrecks take place and he, or others in the employ of the company, is out on the line late at night clearing them up, there is absolutely no necessity of any dispatching service on the part of Mr. Nash and he thinks this time that Mr. Nash stated that he went off duty at 12:15 that he was out on the line himself cleaning up a wreck in which they had lost five lots of logs and he came into the office at 12:15 and Mr. Nash was sitting in the office; that he asked Mr. Nash what he was doing and he said he was waiting for the trains; that trains Nos. 117 and 119 were waiting at Kerry for the train that was wrecked, that is 118, to come in, and there was no necessity of Mr. Nash staying up and he could have gone to bed at six o'clock and simply instructed 117 and 119 to clear for Thompson Siding whenever 118 arrived at Kerry. That during this evening there was no possible chance of any trains meeting on the line. That he did not want the defendant to do anything that would make it an interstate carrier and he had instructed all employes not to receive payment for any shipments on the road beyond Kerry; that the defendant moves traffic only

on bill of lading reading to Kerry. That the first intimation that he ever had that any of the employes of the defendant ever paid any attention to the final destination of a car was during the trial when he saw the destination marked on the train sheets. That he examined the train sheets daily when in his office to see how many logs were coming in and he never noticed before that the final destination of any cars was marked on any of the train sheets and he was surprised to find them marked on the sheets. That the superintendent keeps a working time card of each train and Mr. Nash gets this report and many of the late entries on the train sheets Mr. Nash would write up from the report of the superintendent the next morning. That the passenger train was scheduled to leave Kerry southbound at 4:30 P. M., but it was frequently delayed and sometimes would not get out until as late as 9:00 at night. That the passenger train could not leave Kerry until the logging trains that were out on the line arrived at Kerry and there was no necessity for Mr. Nash remaining up or on duty until the passenger train left as he could just as well have told the passenger train crew to leave Kerry when the other trains had come in as the track would be clear at that time.

Whereupon C. C. Cochran was called as a witness on behalf of the defendant, and, being first duly sworn, testified as follows:

That his office adjoins that of Mr. Nash. That he generally arrives at the office at 7 A. M., when, as a rule, Nash is in the office making his toilet. That Nash usually reads in the office every evening. That during 1919, the trains could be tied up by the dispatcher on an average of not later than 8 or 8:30 P. M., except in case of emergency, which abnormal conditions existed about twenty per cent of the time.

Whereupon defendant rested, and J. G. Nash was recalled as a witness by the plaintiff in rebuttal, and testified as follows :

That on September 1, 1919, he was on duty until 10:35 P. M. That train No. 118 arrived at Kerry at 10:25 P. M., ten minutes before No. 117 left. That it was necessary to see 118 in before 117 could be ordered out. That No. 4 and 118 met at the south end of the tunnel at 9:10 P. M., and so it was necessary to be on duty at 9:10 P. M., to take care of that meeting. That on September 9, 1919, he was on duty until 9:45 P. M., at which hour two trains, 119 and 4, received final orders. That on November 2,

1919, he was on duty until 12:10 A. M. the following morning. That the last train left Kerry at 11:30, arriving at the south end of the tunnel at 12:10 A. M., where they received final clearance. That No. 4 left Kerry at 10:55 P. M., and he sold tickets for that trip. That on November 5 he was on duty until 12:15 A. M. the following morning. That train 117, arriving at Kerry at 11 P. M., unloaded and received his orders at 12:15 A. M. That on November 15, 1919, he was on duty until 9:20 P. M., at which hour he received the report of arrival of 120 at Thompson Siding. That he kept records of all foreign cars on the train sheets, listing them there on the date of handling by the defendant and under the train in which they were hauled. That when the destination of the consignment beyond Kerry was set forth on defendant's bill of lading, he usually changed it to Kerry as final destination. That he would determine the final destination of a foreign car for notation on the train sheets by reference to the S. P. & S. bill of lading. That he had never received instructions not to do so. That the reason for making the said notations was for convenience as train sheets for the three preceding months were always kept on his desk. That he considered that he should not

retire until it was no longer necessary to issue further orders to insure the arrival of trains at destination. That he made notations or check marks signifying that his duty was complete at the time he went off duty. That entries made on train sheets showing arrival of trains after the hour checked were made from the estimated arrival of the train. That he would not consider that the office was closed or that he was off duty until he locked the office and went upstairs to bed. That on the train sheets there are several entries shown after the time when he marked himself off duty and these entries would be simply his estimate as to the running time of the train or else he would make the entry the next morning showing the final arrival of the train at destination.

The foregoing is all of the testimony introduced or offered in the case, and at the conclusion thereof, both parties announced that they had no further or other testimony to offer,

WHEREUPON, plaintiff by its attorney, orally moved the court for a judgment upon the testimony upon the ground that the uncontradicted testimony supported the allegations set forth in plaintiff's complaint, which motion the court over-

ruled.

That thereafter, on the 16th day of August, 1920, the Court made general findings in favor of the defendant and entered judgment in favor of the defendant and against this plaintiff.

That thereafter on the 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a request for Finding of Fact, as follows, to-wit:

“As to whether the movement of C. & N. W. car No. 21543, loaded with shingles and consigned from Elwood Siding, Oregon, to Detroit, Michigan, over the lines of the Columbia & Nehalem River Railroad and other railroads, on September 1, 1919, handled by J. G. Nash, train dispatcher of the Columbia and Nehalem River Railroad at Kerry, Oregon, constituted a movement of trains or the consignment of goods in interstate commerce,”

which request the Court declined to grant, to which action of the Court plaintiff duly requested and was allowed an exception.

EXCEPTION NO. II.

That on the said 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a re-

quest for Finding of Fact, as follows, to-wit:

“As to whether J. G. Nash, train dispatcher for the Columbia & Nehalem River Railroad at Kerry, Oregon, was permitted to remain on duty for a longer period than nine hours on September 1, 1919, in the 24 hour period, to-wit: from the hour of six o'clock A. M., on said date to the hour of 11:50 P. M., on said date, and whether he was employed during that time directing the movement of trains, or a train, engaged in interstate commerce, and whether or not the remaining upon duty of said train dispatcher on September 1, 1919, as stated, was a violation of the Hours of Service Act,”

which request the Court declined to grant, to which action of the Court plaintiff duly requested and was allowed an exception.

EXCEPTION NO. III.

That on the said 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a request for Finding of Fact, as follows, to-wit:

“As to whether the shipment over the line of the Columbia & Nehalem River Railroad and other lines of Car No. 287591, initialed P. R. R.,

containing ties from Birkenfeld, Oregon, to Chicago, Illinois, handled by J. G. Nash, train dispatcher of the Columbia & Nehalem River Railroad, on September 9, 1919, constituted a movement of trains, or a train, engaged in interstate commerce, or the shipment of goods in interstate commerce,”

which request the Court declined to grant, to which action of the Court plaintiff duly requested and was allowed an exception.

EXCEPTION NO. IV.

That on the said 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a request for Finding of Fact, as follows, to-wit:

“As to whether Car No. 76885, initialed C. & N. W., loaded with lumber shipped from Birkenfeld, Oregon, to Springfield, Illinois, handled by Train Dispatcher J. G. Nash of the Columbia & Nehalem River Railroad at Kerry, Oregon, on September 9, 1919, and shipped over the Columbia & Nehalem River Railroad and other railroads, constituted a movement of a train or trains, or the shipment or consignment of goods in interstate commerce,

which request the Court declined to grant, to which

action of the Court plaintiff duly requested and was allowed an exception.

EXCEPTION NO. V.

That on the said 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a request for Finding of Fact, as follows, to-wit:

“As to whether J. G. Nash, train dispatcher at Kerry, Oregon, of the Columbia & Nehalem River Railroad, was permitted to work and remain on duty more than nine hours in the twenty-four hour period in which he was then employed, on September 9, 1919, and whether he was engaged in the directing of trains and dispatching of trains engaged in interstate commerce, or carrying articles which were shipped in interstate commerce,”

which request the Court declined to grant, to which action of the Court plaintiff duly requested and was allowed an exception.

EXCEPTION NO. VI.

That on the said 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a request for Finding of Fact, as follows, to-wit:

“As to whether the movement of Car No.

20098, initialed NW, loaded with lumber consigned from Birkenfeld, Oregon, to Sheridan, Wyoming, over the Columbia & Nehalem River Railroad and other railroads, handled by J. G. Nash at Kerry, Oregon, on November 2, 1919, constituted a movement of a train or trains in interstate commerce, or the shipment or consignment of goods in interstate commerce or forming a part of interstate commerce,”

which request the Court declined to grant, to which action of the Court plaintiff duly requested and was allowed an exception.

EXCEPTION NO. VII.

That on the said 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a request for Finding of Fact, as follows, to-wit:

“As to whether J. G. Nash, train dispatcher of the Columbia & Nehalem River Railroad at Kerry, Oregon, was permitted by the Columbia & Nehalem River Railroad to remain upon duty more than nine hours of the twenty-four hour period in which he was employed on November 22, 1919, and whether he was engaged in dispatching trains engaged in interstate com-

merce, or carrying articles forming a part of interstate commerce in violation of the Hours of Service Act,"

which request the Court declined to grant, to which action of the Court plaintiff duly requested and was allowed an exception.

EXCEPTION NO. VIII.

That on the said 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a request for Finding of Fact, as follows, to-wit:

"As to whether Car No. 2242, initialed C. & E. I., loaded with shingles consigned from M. J. Campbell Lumber Company, Elwood, Oregon, to Ventura, California, on November 5, 1919, handled by J. G. Nash, train dispatcher of the Columbia & Nehalem River Railroad at Kerry, Oregon, constituted a movement of a car or cars engaged in interstate commerce, and whether it constituted a shipment of articles in interstate commerce,"

which request the Court declined to grant, to which action of the Court plaintiff duly requested and was allowed an exception.

EXCEPTION NO. IX.

That on the said 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a request for Finding of Fact, as follows, to-wit:

“As to whether J. G. Nash, train dispatcher of the Columbia & Nehalem River Railroad at Kerry, Oregon, was permitted to work more than nine hours in the twenty-four hour period in which he was employed on November 5, 1919, at Kerry, Oregon, and whether he was then engaged in handling cars engaged in interstate commerce or dispatching cars carrying articles forming a part of interstate commerce,”

which request the Court declined to grant, to which action of the Court plaintiff duly requested and was allowed an exception.

EXCEPTION NO. X.

That on the said 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a request for Finding of Fact, as follows, to-wit:

“As to whether Car No. 72682, initialed LV, containing shingles consigned from Nehalem Camp, Oregon, to Cheyenne, Wyoming, over the Columbia & Nehalem River Railroad and other

railroads, handled by Train Dispatcher J. G. Nash of the Columbia & Nehalem River Railroad at Kerry, Oregon, on November 15, 1919, constituted a train engaged in interstate commerce, or the shipment or consignment of articles forming a part of interstate commerce,”

which request the Court declined to grant, to which action of the Court plaintiff duly requested and was allowed an exception.

EXCEPTION NO. XI.

That on the said 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a request for Finding of Fact, as follows, to-wit:

“As to whether Train Dispatcher J. G. Nash, of the Columbia & Nehalem River Railroad at Kerry, Oregon, was permitted on November 15, 1919, to work more than nine hours in the said twenty-four hour period on the said day on which he was employed and whether he was engaged in dispatching trains engaged in carrying articles forming a part of interstate commerce and whether he was engaged in dispatching trains engaged in interstate commerce and whether the working of J. G. Nash on said November 15, 1919, constituted a violation of the

Hours of Service Act," which request the Court declined to grant, to which action of the Court plaintiff duly requested and was allowed an exception.

EXCEPTION NO. XII.

That on the said 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a request for Finding of Fact, as follows, to-wit:

"As to whether the shipment and consignment of express packages of the Columbia & Nehalem River Railroad from points along the line of the Columbia & Nehalem River Railroad in the State of Oregon, to points outside of the State of Oregon and over other railroads, constituted the carrying of articles forming a part of interstate commerce,"

which request the Court declined to grant, to which action of the Court plaintiff duly requested and was allowed an exception.

EXCEPTION NO. XIII.

That on the said 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a request for Finding of Fact, as follows, to-wit:

“As to whether the receipt of articles shipped from points outside of the State of Oregon, over other railroads than the Columbia & Nehalem River Railroad, by the Columbia & Nehalem River Railroad within the State of Oregon, to be delivered and transmitted by said Columbia & Nehalem River Railroad to points along the line of said railroad, constituted the carrying of articles forming a part of interstate commerce,”

which request the Court declined to grant, to which action of the Court plaintiff duly requested and was allowed an exception.

EXCEPTION NO. XIV.

That on the said 13th day of December, 1920, plaintiff, by its attorney, presented to the Court a request for Finding of Fact, as follows, to-wit:

“As to whether the receiving of articles which had been shipped in interstate commerce over other railroads than the Columbia & Nehalem River Railroad by the Columbia & Nehalem River Railroad indiscriminately as to whether the articles came from outside the State of Oregon, or within the State of Oregon, but

were actually shipped from points outside the State of Oregon, constituted the carrying of articles forming a part of interstate commerce," which request the Court declined to grant, to which action of the Court plaintiff duly requested and was allowed an exception.

And it is certified that the foregoing and the original exhibits which are annexed hereto and made a part hereof are all of the testimony, evidence, records and exceptions in said cause material to the exceptions herein noted.

And thereafter plaintiff presented this bill of exceptions which is hereby allowed.

R. S. BEAN,
Judge.

Within Bill of Exceptions lodged with me as Clerk of the within entitled Court, this 12th day of February, 1921.

G. H. MARSH,
Clerk.

AND AFTERWARDS, to-wit, on Thursday, the 10th day of March 1921, the same being the 4th judicial day of the regular March term of said Court; present the Honorable Robert S. Bean, United States

District Judge, presiding, the following proceedings were had in said cause, to-wit:

(ORDER FORWARDING EXHIBITS)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF AMERICA,	} Order.
Plaintiff,	
vs.	
COLUMBIA & NEHALEM RIVER RAILROAD COMPANY, Defendant.	

Now, at this time, Thos. H. Maguire, Assistant United States Attorney, for the District of Oregon, attorney for the plaintiff herein, appearing before the Court, requesting an Order that the exhibits herein be forwarded with the transcript of Record to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, for the reason that it is impracticable to copy and incorporate the said exhibits in the transcript of record herein,

It is, therefore, ordered that all of the exhibits in the above entitled case be forwarded with the transcript of record, by the clerk of the above entitled

court, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

R. S. BEAN,

Judge .

Dated at Portland, Oregon, this 10th day of March, 1921.

AND AFTERWARDS, to-wit, on Thursday, the 10th day of March, 1921, the same being the 4th judicial day of the regular March term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

(ORDER EXTENDING TIME)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF
AMERICA,

Plaintiff,

vs.

COLUMBIA & NEHALEM RIVER
RAILROAD COMPANY,

Defendant.

Order.

Now, at this time, upon motion of Thos. H. Maguire, Assistant United States Attorney, for the Dis-

trict of Oregon, attorney for the plaintiff herein,

It is ordered that the plaintiff be, and it is hereby allowed until the 31st day of March, 1921, in which to file the transcript of record in the above entitled case.

R. S. BEAN,

Judge.

Dated at Portland, Oregon, this 10th day of March, 1921.

AND AFTERWARDS, to-wit, on the 11th day of March, 1921, there was duly filed in said Court, a Stipulation, in words and figures as follows, to-wit:

(STIPULATION AS TO RECORD)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF
AMERICA,

Plaintiff,

vs.

COLUMBIA & NEHALEM RIVER
RAILROAD COMPANY,

Defendant.

} Stipulation.

IT IS HEREBY STIPULATED and AGREED
by and between the United States of America, plain-
tiff herein, by Thos. H. Maguire, Assistant United

States Attorney for the District of Oregon, and Columbia & Nehalem River Railroad Company, by Wilbur, Beckett & Howell, its attorneys, that the following documents, papers and records shall be included in the transcript of record in said cause and that the same are all the necessary documents, papers and records to be considered in reviewing said case on Writ of Error, to-wit:

Complaint

Answer

Stipulation waiving jury trial

Opinion of the Court

Findings of Fact and Conclusions of Law

Judgment

Order extending time

Order extending time

Order extending time

Request for Findings of Fact

Order extending time

Order extending time

Petition for Writ of Error

Assignment of Errors

Order allowing Writ of Error

Citation on Writ of Error

Writ of Error

Bill of Exceptions

Order forwarding exhibits

Order extending time

Stipulation as to Record.

IT IS FURTHER STIPULATED by and between the respective parties hereto that the foregoing printed record now tendered to the Clerk of the above entitled Court for his certificate and filed in the above entitled cause, is a true transcript of the record in said cause and that the said Clerk may certify said transcript to the United States Circuit Court of Appeals for the Ninth Circuit without comparing the same with the original record, which is on file herein.

Dated this 11th day of March, 1921.

THOS. H. MAGUIRE,

Assistant United States Attorney for the
District of Oregon.

WILBUR, BECKETT & HOWELL,

Attorneys for Defendant.

(CERTIFICATE OF CLERK)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

THE UNITED STATES OF AMERICA,	} Plaintiff, } Defendant.
vs.	
COLUMBIA & NEHALEM RIVER RAILROAD COMPANY,	

UNITED STATES OF AMERICA,)) ss.
DISTRICT OF OREGON,)	

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing printed Transcript of Record on Writ of Error, in the case of United States of America, Plaintiff in Error, vs. Columbia & Nehalem River Railroad Company, Defendant in Error, is a true transcript of the record in said cause in said Court. This certificate is made without comparing said Transcript of Record with the original record in said cause, pursuant to the stipulation of the parties therein that this record may be certified to by me, to be a true copy, without comparison.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at Portland, in said District, this day of March, 1921.

Clerk.



IN THE)
**United States Circuit Court
of Appeals**

For the Ninth Circuit

THE UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

COLUMBIA & NEHALEM RIVER RAILROAD
COMPANY,

Defendant in Error.

Brief of Plaintiff in Error

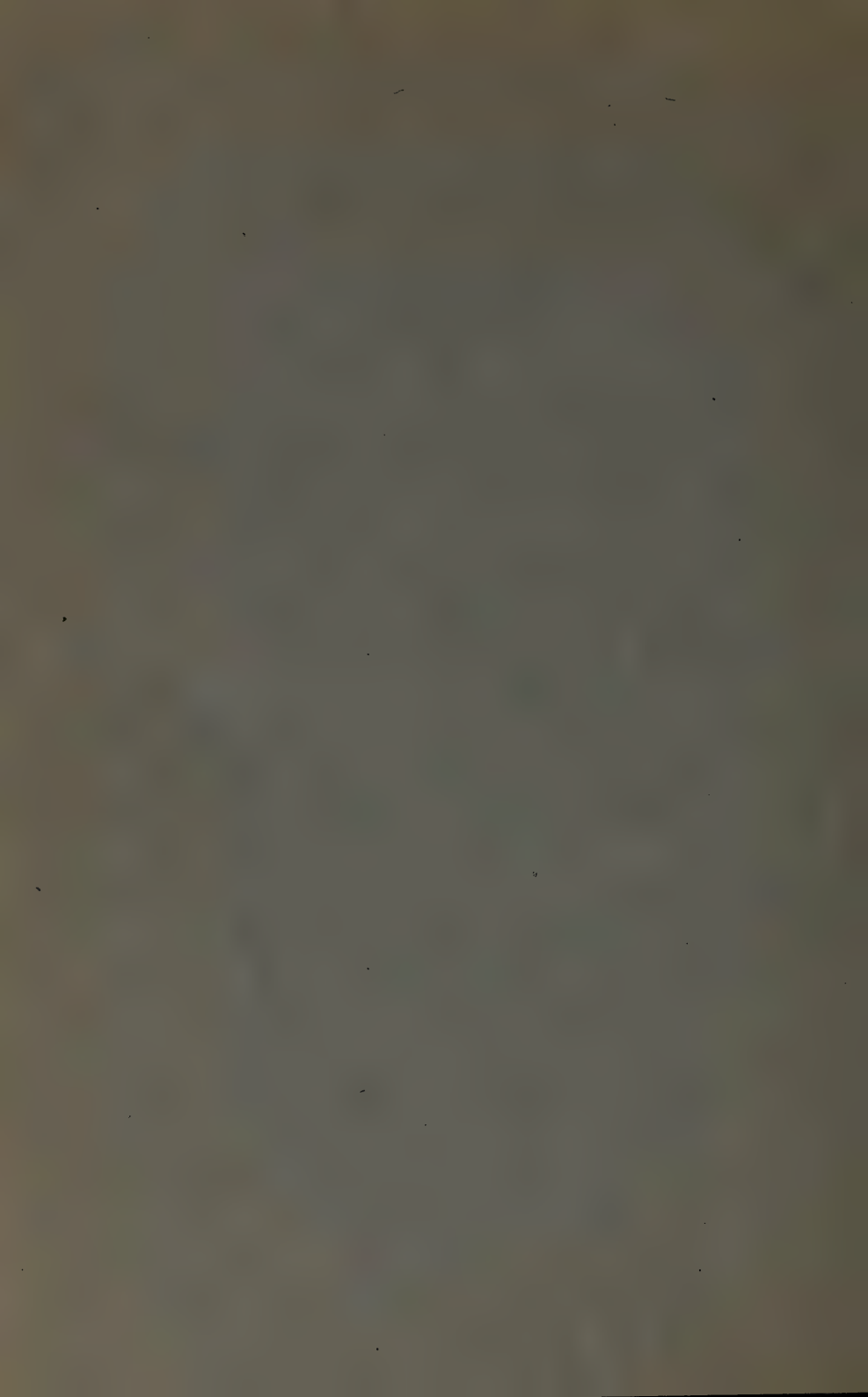
Upon Writ of Error to the United States District
Court for the District of Oregon

LESTER W. HUMPHREYS,

United States Attorney for Oregon.

THOS. H. MAGUIRE,

Assistant United States Attorney for Oregon.
Attorneys for Plaintiff in Error.



IN THE
**United States Circuit Court
of Appeals**

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
COLUMBIA & NEHALEM RIVER RAILROAD
COMPANY,
Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District
Court for the District of Oregon

LESTER W. HUMPHREYS,
United States Attorney for Oregon.
THOS. H. MAGUIRE,
Assistant United States Attorney for Oregon.
Attorneys for Plaintiff in Error.

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STATEMENT OF THE CASE

This is an action brought by the United States of America under the Act of Congress known as "An Act to promote the safety of employes and travelers upon railroads, by limiting the hours of service of employes thereon," known as the "Hours of Service Act," approved March 4, 1907 (34 Statutes at Large, page 1415). A complaint was filed in the United States District Court for the District of Oregon on the 3rd day of April, 1920 (Transcript, pp. 5-13), and the case came to trial on the 15th day of July, 1920, before the Honorable Robert S. Bean, District Judge, the parties having theretofore waived jury trial (Transcript, pp. 16, 17). On the 16th day of August, 1920, the Court filed Findings of Fact and Conclusions of Law, stating that the defendant was not engaged in interstate commerce, and so the plaintiff was not entitled to recover upon any of its causes of action, of which there were five, and on the same date judgment was filed in favor of the defendant (Transcript, pp. 23-27). The complaint alleged that on September 1, 1919, September 9, 1919, Novem-

ber 3, 1919, November 5, 1919, and November 15, 1919, the defendant corporation required and permitted one J. G. Nash, a train dispatcher for the railroad, to remain on duty more than nine hours in the twenty-four hour period, covered by the said dates, and while on duty, to dispatch, report, transmit, receive and deliver orders, by use of the telephone, pertaining to and affecting the movement of trains engaged in interstate commerce (Transcript, pp. 5-13). The defendant is a logging railroad, lying entirely within the State of Oregon, being twenty-six miles in length. The evidence showed that on each of the dates mentioned in the complaint, the defendant had handled over its lines shipments of lumber and through freight which were destined for points outside of the State of Oregon, and also cars from other railroads were brought over defendant's lines, for the purpose of loading and reshipment to exterior points (Transcript, pp. 54, 55, 63-65). The general practice of the defendant railroad was to demand of the shippers, two shipping orders for each shipment destined for points beyond defendants' terminus, at Kerry, Oregon; one shipping order covering carriage of the freight from point of origin on defendant's lines to defendant's terminus, at Kerry; the second shipping order covering carriage

of freight over the lines of the Spokane, Portland & Seattle Railway, the only railroad which had physical contact with the lines of defendant, and connecting lines to the final destination. However, several shipping orders were introduced in evidence from defendant's files, showing the final destination not to be Kerry, but a point outside of the State of Oregon. But those shipping orders were made out in error by the shipper, and were accepted by agents of the defendant by mistake and inadvertence, as instructions had been issued, both to employes and shippers, as to the proper method of billing freight. The usual practice was to forward the two shipping orders, with the shipment, to defendant's offices, at Kerry, where defendant's agent would retain the shipping order designed for defendant and place the other shipping order in a box near the S. P. & S. station. The car was then detached from the train and placed on a spur of the S. P. & S., the load not having been disturbed nor changed from the original car to another. The freight conductor of the next east bound S. P. & S. train would then stop and, attaching the car to his train, pick up the shipping order and deliver both to the station agent at Clatskanie, the first station on the S. P. & S. line east of Kerry, for preparation

of the waybill (Transcript, pp. 56-58, 60-62). The S. P. & S. had no station agent at Kerry. The defendant railroad had no through rates or traffic arrangements with any other road, and no conventional agreement for the division of charges. It issued no bills of lading for carriage beyond its own line, and neither assumed, charged nor collected freight for carriage on other lines; nor did it receive or accept goods on through bills of lading from exterior points consigned to points on its line; nor did any per diem agreement covering the use of cars exist between the defendant and any other railroad, but, on the contrary, defendant paid demurrage on freight cars in the same manner as an ordinary shipper (Transcript, pp. 57, 71). The duties of the dispatcher included, not only the supervision of train movements, but also the sale of tickets for the passenger cars operated by defendant; which he did on different occasions after the completion of his duties as dispatcher (Transcript, p. 79). The President of the defendant corporation testified that he did not know that the dispatcher was on duty for periods exceeding nine hours, and was of the opinion that, though he spent longer than nine hours per day in his office, it was because he used the office not only

for business purposes, but also as a recreation room when he was off duty. He further testified that many of the orders given by the dispatcher were unnecessary, as the road is only twenty-six miles in length; has two passing tracks; and no regular freight train schedule is maintained (Transcript, pp. 74, 75). The defendant accepted all shipments from points on defendant's own lines to any destination, regardless of whether or not it was a point on defendant's line, a point within the State of Oregon, or outside the boundaries of the State. Defendant was a common carrier under the laws of the State of Oregon, having been incorporated as such. After the judgment of the Court had been entered, plaintiff requested the Court to make special Findings of Fact (an extension of time having been allowed by the Court for this purpose), covering the material issues of the case, for the reason that it contended that the Findings as made by the Court did not state the material issues of the case; were not sustained by the evidence; and were mere conclusions of law, which request the Court denied, and allowed an exception. (Transcript, pp. 30-36.)

The above, we believe, is a sufficient statement of the nature of the case. The errors complained of

by the plaintiff in error are all of them general in nature and regard the sufficiency of the Findings to support the judgment, and the failure of the evidence to sustain the Findings made by the Court.

SPECIFICATIONS OF ERROR

I.

The Court erred in making each of the Findings of Fact herein (pp. 24 and 25, Transcript of Record), for the reason that they are not sustained by the evidence adduced at the trial of the case (Assignments of Error, I to VI, inclusive, Trans. of Record, pp. 42 and 43).

II.

The Court erred in declining to make any of the Findings of Fact as requested by plaintiff, for the reason that, if the Court had made Findings of Fact relative to the points requested, the Findings would not have sustained judgment for the defendant, but, on the contrary, for the plaintiff. (Assignments of Error, XII to XXV, inclusive, Trans. of Record, pp. 44, 45 and 46).

III.

The Court erred in making each of the Findings of Fact herein, for the reason that they do not include

all of the material issues of the case, and are not, in fact, Findings of Fact, but mere conclusions of law, and, therefore, do not sustain the judgment. (Assignments of Error, VII to XI, inclusive, Trans. of Record, pp. 43 and 44.)

ARGUMENT

I.

For the purpose of argument, the first and second specifications of error may be considered together, for the reason that both specifications deal with the insufficiency of the evidence to support the Findings and judgment. For the convenience of the Court, in considering the argument, we, therefore, propose to separate it under the following headings:

1. Where a common carrier accepts a car of freight from a point on its own lines, the final destination of which is a point in another state, and delivers the said car to another carrier, the movement is in interstate commerce.

U. S. vs. Colorado & N. W. R. R., 157 Fed. 321;
15 L. R. A. (N. S.) 167; 13 Ann. Cas. 893.

Barrett vs. City of N. Y., 183 Fed. 793.

Ala. Gt. Southern Railway Co. vs. McFadden,
232 Fed. 1000.

McFadden vs. Ala. Gt. Southern R. R. Co., 241
Fed. 562.

U. S. vs. Chicago P. N. S. L. Railway Co., 143
Fed. 353.

Coe vs. Errol, 116 U. S. 517.

The Daniel Ball, 10 Wall. 557.

Chi. Mil. & St. P. R. R. Co. vs. State of Iowa,
233 U. S. 334.

Ohio R. R. Commision vs. Worthington, 225
U. S. 101.

In the case of United States versus Colorado and
N. W. R. R., 157 Fed. 321, the Court said:

“Importation into one state from another is the indispensable element, the test of interstate commerce. Every part of every transportation of articles of commerce in a continuous passage from an inception in one state to a prescribed destination in another is a transaction in interstate commerce. Goods so carried never cease to be articles of interstate commerce from the time they are started on their passage in one state until their delivery at their destination in another is completed, and they there mingle with and become a part of the great mass of the property within the latter state. Their transporta-

tion never ceases to be a transaction of interstate commerce from its inception in one state until the delivery of the goods at their prescribed destination in the other, and everyone who participates in it, who carries the goods in any part of their continuous passage, unavoidably engages in interstate commerce."

In the case of Alabama Great Southern Railway Co. vs. McFadden, 232 Fed. 1000, the court made the following ruling:

"Where the cotton was shipped to a point within the state where the shipments originated and there compressed, from thence being carried to points without the state, the shipments to the point where the cotton was compressed were not intrastate commerce shipments, there being no change of ownership, but were part of an interstate shipment, and interstate rates should be charged; the mere fact that the cotton was not always billed to its ultimate destination until after compression not affecting the matter."

It will be seen from the above extracts, that Courts have held, even in more extreme cases than the one at bar, that the mere passage through the

hands of the carrier during a portion of the interstate journey, made the carrier unavoidably an interstate carrier. However, in the case at bar, the evidence shows that the cars of freight were not even disturbed, but were simply transferred to the lines of a connecting carrier without unloading and reloading, and thence shipped to their final destination.

2. A carrier cannot divest a shipment of its interstate character by compelling the shipper to accept one bill of lading over its own lines and a second bill of lading over the connecting lines.

U. S. vs. Colorado N. W. R. R., 157 Fed. 321;
15 L. R. A. (NS) 167; 13 Ann. Cas. 893.

McFadden vs. Ala. Gt. Southern R. R. Co., 241
Fed. 562.

U. S. vs. Phila. & R. Railway Co., 232 Fed. 946.
Southern Pacific Terminal Co. vs. Interstate
Commerce Commission, 219 U. S. 498.

Ohio R. R. Commision vs. Worthington, 225
U. S. 101.

Cutting vs. Fla. Railway & Navigation Co., 46
Fed. 641.

Meyer vs. Id.

Brown vs. Id.

Central Trust Co. vs. Id.

Guaranty Trust & Safe Deposit Co. vs. Id.

U. S. vs. Southern Railway Co., 135 Fed. 122.

Texas & New Orleans R. R. Co. vs. Sabine
Tram Co., 227 U. S. 111; 33 Sup. Ct. 229;
57 L. Ed. 442.

In the case of United States versus Colorado & N. W. Railroad Co., the defendant corporation, of Colorado, owned and operated a narrow gauge railroad, which consisted of a main line, about ten miles long, and two branches, each about eighteen miles in length. The entire railroad was within the State of Colorado. The defendant was a common carrier and it transported in one of its freight cars, from one of its termini where it had received it from the Union Pacific Railroad Co., to a station upon its line, a shipment of hardware which had been sent from Omaha, Nebraska. In the same car it carried three other shipments of goods from points without the state to destinations on its line. These shipments were not carried upon through bills of lading, but they were consigned and carried upon continuous passages from other points of origin outside the state, to their destinations on defendant's line. Each shipment was re-billed from the terminus of defendant to its final destination on defendant's line. In that case the Court held

that the railroad was engaged in interstate commerce, regardless of whether or not the goods traveled on through bills of lading.

In the case of *Cutting vs. Fla. Railway & Nav. Co., et al.*, (46 Fed. 641) certain orange growers in Florida shipped their fruit from one point in that state to another point in the same state, consigned to their agent at the latter point for re-shipment, who immediately forwarded them to their destination in another state. It was held by the Court that the shipment from the growers to the forwarding agent was interstate commerce. The Court, in making this decision, quoted a decision of the Court in *The Daniel Ball*, 10 Wall. 567:

“***for when a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulations of commerce.”

In the case of *United States vs. Southern Railway Co.*, 135 Fed. 122, a car loaded with coal, to be delivered to a consignee in another state was deemed by the Court to be used in moving interstate traffic by the railroad company which took it to the place of loading, although such company only undertook to deliver it to a connecting carrier within the same state.

In the case of *Texas & N. O. R. R. Co. vs Sabine Tram Co.*, 227 U. S. 111, the Court said:

“The essential character of the commerce, not its mere accidents, should determine.”

It had been contended by counsel that the fact that separate bills of lading were delivered covering the shipment entirely within one state divested the shipment of its interstate character. Regarding this contention, the Court further said:

“Once admit the principle and means will be afforded of evading the National control of foreign commerce from points in the interior of a state. There must be trans-shipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading the commerce will be given local character, though it be essentially foreign.”

The conclusion of the Court in the above case was, that the device of separate bills of lading did not divest the shipment of its interstate character or foreign character, but that the essential nature of the transaction should be taken into consideration.

It will be seen by the above decisions that the character of the transaction is bound, not by the artificial device of separate bills of lading, but rather by the fact that the shipment, itself, is designed to be carried from one state to another. If it were the case that a carrier could relieve itself from federal supervision merely by demanding separate shipping orders and issuing separate bills of lading for the carriage of the shipment in each state, there would be no need of an Interstate Commerce Commission, for every carrier could easily evade the law by making out separate bills of lading from one state boundary line to the next boundary line, and so on, until the completion of the journey.

3. The fact that defendant had no joint agreements with connecting lines concerning division of rates, joint rates, interchange of cars, per diem agreement as to use of cars, routing of traffic, or any other agreement as to movement of shipments after leaving defendant's lines, does not divest shipments

of their interstate character if they are, in fact, a part of interstate commerce.

U. S. vs. Union Stock Yds.Co., 161 Fed. 919.

Union Stock Yds. Co., vs. U. S. 169 Fed. 404.

U. S. vs. Southern Railway Co., 135 Fed. 122.

U. S. vs. Colorado & N. W. R. R. Co., 157 Fed. 321.

In the case of United States versus Colorado & N. W. R. R. Co., cited above, the Court said:

“This case presents a single question: Is a common carrier which operates a railroad entirely within a single state, and transports thereon articles of commerce shipped in continuous passages from places without the state to stations on its road, or from stations on its road to points without the state, free from any common control, management or arrangement with another carrier for a continuous carriage or shipment thereof, subject to the provisions of the Safety Appliance Act?”

The final conclusion of the Court was:

“A common carrier which operates a railroad entirely within a single state and transports thereon articles of commerce shipped in continu-

ous passages from places without the state to stations on its road, or from stations on its road to points without the state, is subject to the provisions of the Safety Appliance Act, although it carries the property free from common control, management or arrangement with another carrier, for a continuous carriage or shipment of the goods."

The above case which was decided by the Circuit Court of appeals for the Eighth Circuit has been quoted in numerous decisions of the District Courts throughout the country. It will be seen after perusal of the above cited cases, that the intention of the carrier as evidenced by its agreement with other carriers does not determine the character of the transaction. If the goods or shipments are, in fact, a part of interstate commerce, the unwillingness of the carrier to engage in interstate traffic and attempted subterfuges, consisting of abstaining from such agreements and seeking to evade any consequences of its so engaging by means of technical devices, will avail it nothing.

4. The fact that the major portion of the carrier's freight consists of carriage of its own logs, is immaterial where it is, in fact, a common carrier and

accepts freight as a common carrier.

No cases are cited in this connection, for the reason that this statement is a logical sequence of the preceding statements. A carrier to be engaged in interstate commerce need not necessarily devote all of its time to interstate shipments, and a single shipment which was interstate in character would render the carrier an interstate carrier as far, at least, as that particular shipment is concerned.

5. Excess service is "required and permitted" within the meaning of the Hours of Service Act, whenever the officer or agent of the carrier fails to prohibit such service.

U. S. vs. Pittsburg, Cincinnati, Chicago & St. L. Railway Co., D. C. W. D. Pa. Decided September 8, 1920. (Not reported.)

O. W. R. & N. Co. vs. U. S. 223 Fed. 596.

Section 3 of the Hours of Service Act provides that excess service is required and permitted within the meaning of the Act, whenever the officer or agent of the carrier fails to prohibit such service. This section of the Act has been upheld in the above cited cases.

6. It is not necessary in order to render the carrier liable under this Act, that all of the excess time

spent by the employe in the performance of his duties should be devoted to the dispatching of interstate train movements.

U. S. vs. Atchison T. & S. F. Railway Co.
District Court S. D. Cal. S. D. Nov. 3, 1920.
(Not yet reported.)

Los Angeles & S. L. R. R. Co. vs. U. S. 213
Fed. 326.

Delano vs. U. S. 220 Fed. 635,636.

B. & O. R. Co. vs. Commerce Commission, 221
U. S. 612.

Missouri K. & T. R. Co. vs. U. S., 213 U. S.
112.

U. S. vs. Gt. N. R. Co., 206 Fed. 838.

In the case of Delano vs. United States, cited above, a train dispatcher had been employed by the defendant to perform the duties of train dispatcher, and also ticket seller. During the time in excess of nine hours, he had dispatched no trains, but had sold tickets. However, the Court in that case held that a violation of the Hours of Service Act had been committed, and in making this decision, the Court said:

“The evil to be cured did not come from the employe’s selling tickets or doing work for other people when off duty, but from the power of the

carriers customarily exercised, to require their employes who were concerned with train movements, to do extra and over-time work."

In the light of the above decisions, it will be very apparent to the Court that the defendant's attempted excuse, consisting of the fact that the train dispatcher did not engage in the dispatching or movement of trains in excess of nine hours, but that the excess service, if any, consisted in selling tickets, would not be a valid defense for the violation of the Act. The purpose of this Act is not so much to prevent one person from dispatching trains for a longer period than nine hours, but is aimed against the over-working of persons ordinarily engaged in superintending or dispatching the movements of trains—whether they be engaged in dispatching or in any other duties.

7. The office maintained by defendant at Kerry was operated continuously night and day within the meaning of the Hours of Service Act.

U. S. vs. B. & M. R. R., 269 Fed. 89.

U. S. vs. Atlantic Coast Line R. Co., 211 Fed. 897.

U. S. vs. Grand Rapids & I. Railway Co., 224 Fed. 667.

U. S. vs. Atchison, 220 U. S. 37, 44.

U. S. vs. Cornwall & Lebanon R. R. Co., 268
Fed. 680.

The above cases furnish concrete examples of offices operated continuously night and day, within the meaning of this Act. It is a universal ruling of the Courts that the phrase "operated continuously night and day," does not necessarily mean an office open twenty-four hours at a time, but simply one that is operated in the daytime and in the night time, using the words in their ordinary significance.

It will be seen from the Findings of Fact actually filed by the Court herein that the Court decided that the defendant did not come within the purview of the Hours of Service Act for the reason that it was not an interstate carrier. The other elements of an offense against the Act are entirely ignored, both in the Findings and in the opinion filed by the Court. In its decision, the Court has ignored the decisions cited above and has decided that the defendant is not engaged in interstate commerce for the reason that since the entire traffic of the road consisted of logs and lumber products which were hauled by defendant directly from the camps where they were prepared, that the case comes under the decision ren-

dered in *Coe vs. Errol*, cited above, on the ground that the Court in that case said that an interstate movement does not begin while the product is being transported from the farm or forest to the depot. In the case at bar, the products had already been hauled from the forest to the carrier before they ever came into defendant's possession. The goods were first loaded into cars, were then assembled into a train on defendant's lines, and bill of lading was issued by defendant upon the hauling of the goods. In the case of *Coe vs. Errol*, the product referred to consisted of logs that had been hauled from the spot where they were felled, and left on the bank of a stream, waiting for the flood season in order to float them down the stream into another state. We respectfully submit that the two cases are not in the least parallel; otherwise, following the Court's reasoning, the logs hauled by defendant would still be deemed en route from the forest to the depot until they reached their final destination, because the defendant observed every formality that any of the connecting carriers observed.

The plaintiff afterwards submitted a request for Findings of Fact upon certain points. If the Court had made Findings covering those points, he would

have covered the material issues of the case, which were:

First—Whether or not the defendant was engaged in interstate commerce, and was an interstate carrier on the dates in question.

Second—Whether the dispatcher was required or permitted to remain on duty longer than nine hours in any one day on said dates.

Third—Whether, while he was on duty, he was engaged in the dispatching of trains carrying interstate shipments on said dates.

But the Findings actually made by the Court did not cover the gist of the action, they merely touched upon one point involved, and the Findings, themselves, were not supported by the evidence.

There can be no doubt, whatever, but that the defendant, whether it wished to do so or not, was on the dates in dispute engaged in interstate commerce, in that it hauled shipments that were destined for points outside the State of Oregon; that the journey was continuous, as the cars were allowed to remain as they were originally loaded and were delivered by defendant to a side-track of a connecting carrier, and were picked up by the next train of the connecting

carrier which passed the point.

There can be no doubt, after a perusal of the Findings adduced at the trial and an examination of the rulings made by other Courts in similar cases, that the decision of the Court in the case at bar was an arbitrary one, which was not sustained by the evidence and which was contrary to law.

II.

It is further contended by plaintiff that the Court erred in making each of the Findings of Fact, for the reason that they do not include all of the material issues of the case and are not, in fact, Findings of Fact, but are mere conclusions of law, and, therefore, do not sustain the judgment.

This specification, though it is set forth in the Assignments of Error, was not included in the Bill of Exceptions, no exception having been taken to the Findings of Fact at the time. But the point need not be raised by Bill of Exceptions in order to bring it to the consideration of this Court. Section 172, Oregon Laws, provides:

“The statement of the exception when settled and allowed shall be signed by the judge and filed with the clerk, and thereafter it shall be

deemed and taken to be a part of the record of the cause. No exception need be taken or allowed to any decision upon a matter of law when the same is entered upon the journal or made wholly upon matters in writing and on file in the Court."

In the case of *Nelson vs. U. S.*, 30 Fed. 112, the demurrer in a criminal case was overruled by the trial Court, and when the matter came up on writ of error, it was found that the Bill of Exceptions contained only the exception taken by the defendant to the order of the Court overruling the demurrer.

Judge Deady, in rendering his decision, said:

"The office of a Bill of Exceptions is only to reduce to writing and put on record some action of the Court involving a question of law, as the admission or rejection of evidence, or a direction to the jury, that ordinarily transpires in pais, and to which the party obtaining the same took exception at the time. But an act of the Court such as an order or judgment, which in the due and usual course of procedure is entered in its record, need not be excepted to by the party against whom the same was made or given, and, therefore, is not the subject of a bill of excep-

tions."

In the case of *Chung vs. Stephenson*, 50 Ore. 247, 89 Pac. 386, 805, the Court said:

"Where the error appears from the record, namely, the pleadings and the findings, and does not depend upon a Bill of Exceptions to disclose it, it may be reviewed on appeal, though no exception was taken."

The Court further said:

"It is claimed on this motion that the failure of the lower court to find upon the defendant's counterclaim for damages was not excepted to in the lower court, and cannot be reviewed here although assigned as error. This question was not suggested at the argument, but the findings in a law action are entered in the journal and, with the pleadings, is part of the judgment roll; and if any error of the court below is disclosed therefrom, it may be relied upon by this Court without an exception thereto."

Other cases sustaining this view are:

McPheeters vs. Smith, 85 Ore. 597.

Tyner vs. Gapin, 3 Blackf. 372.

State vs. Drake, 11. Ore. 396; 4 Pac. 1204.

State vs. McGinnis, 17 Ore. 333; 20 Pac. 632.

State vs. Chee Gong, 17 Ore. 635, 21 Pac. 882.

State vs. Cody, 18 Ore. 535, 23 Pac. 891; 24 Pac. 895.

Kapischka vs. Tillamook Hotel Co., 86 Ore. 499; 168 Pac. 938.

Moody vs. Richards, 29 Ore. 282, 45 Pac. 777.

It will be seen from the above decisions that the purpose of a Bill of Exceptions is to place before the Appellate Court all matters which would not appear in the judgment roll. In the case at bar, the Court now has before it the complaint and the Findings of Fact. It is simply upon the face of the record that the plaintiff in error is relying. The complaint sets forth five causes of action, each cause of action involving several material issues, the issues being:

First—Whether or not the Railroad was engaged in interstate commerce on the dates in question;

Second—Whether or not the train dispatcher was permitted upon those dates to be at his post longer than nine hours out of twenty-four hours; and

Third—Whether during the time he was so on duty he directed the movements of trains con-

taining interstate shipments.

But the Findings of Fact as made by the Court simply define and decide one of the material issues for each cause of action.

It is further contended by plaintiff in error that the Findings of Fact as made by the Court do not include the material issues and, for that reason, do not support the judgment.

Moody vs. Richards, 29 Ore. 282-285; 45 Pac. 777.

Fink vs. Canyon Road Co., 5 Ore. 301-310.

Drainage Dist. vs. Crow, 20 Ore. 535-537; 26 Pac. 845-846.

Dowd vs. Clark, 51 Cal. 262.

Pengra vs. Wheeler, 24 Ore. 532-538; 34 Pac. 354; 21 L. R. A. 726.

Jameson vs. Coldwell, 25 Ore. 199; 35 Pac. 245.

Breding vs. Williams, 33 Ore. 393; 54 Pac. 206.

Lewis vs. Bank, 46 Ore. 187; 78 Pac. 990.

In the case of Moody vs. Richards, cited above, the trial court had failed to find certain facts, and, therefore, defendant's counsel contended that the findings did not support the judgment, and plaintiff's counsel insisted that no request having been made for more specific findings, the judgment was not

subject to review on appeal. In this connection the Court said:

“The right to a trial by jury may be waived by the parties to an action and the issue of fact tried by the Court which must state the facts found, and this finding shall be deemed as a verdict and upon being filed with the clerk during the term or within twenty days thereafter, judgment may be entered thereon. If the statement be considered as a general verdict, it must be presumed that every material issue raised by the pleadings has been passed upon. (Shmit vs. Day, 27 Ore. 110; 39 Pac. 870.) But Judge Thompson in his work on Trials, Section 2658, in speaking on this subject, says: ‘Such a finding of fact is in the nature of a special verdict and its sufficiency is determined by the same rules.’ The statute making it incumbent upon the Court to state the facts found, the consent of a party to submit his cause for trial without the intervention of a jury must be construed as a request for a special verdict, which necessitates a finding upon all the material issues involved in the action . . . It is true the defendant did not request the Court to make more specific

findings, nor do we think it was incumbent upon him to do so, for if a request were essential to obtain a statement of facts found upon the material issues, it would necessarily follow that without such request the Court could disregard the plain provisions of the statute and refuse to make any statement of its findings. . . .

The complaint having alleged an express promise to repay, the issue in question became material and the finding thereon indispensable without any request therefor. Aside from the agreement to submit the cause for trial by the Court without the intervention of a jury, and the Court having failed to make such finding of fact, no foundation was laid upon which the judgment could rest, and, hence, it is reversed and a new trial ordered."

In the case of *Chung vs. Stephenson*, cited above, the Court said:

"Also there must be findings of fact to sustain the judgment. The rule is well settled that all material issues must be passed upon. *Fink vs. Canyon Road Co.*, 5 Ore. 301-310. It is said in *Drainage District vs. Crow*, 'Where a cause is tried by the Court without the intervention of

a jury, there must be findings of fact sufficient to sustain the judgment. All of the material issues should be passed upon. . . . In *Dowd vs. Clarke*, 51 Cal. 262, it was held that a judgment could not stand unless there were full findings which respond to all the material issues made by the pleadings.' In that case there was no Bill of Exceptions and, hence, no exceptions, and the cause was reversed because the findings did not support the judgment. In *Pengra vs. Wheeler*, 24 Ore. 532-538; 34 Pac. 354; 21 L. R. A. 726, where the omission of the Court to find upon a counterclaim for damages was assigned as error, *Drainage District vs. Crow* was cited with approval, and Mr. Justice Moore says: 'The law is well settled in this state that when a cause is tried by Court without the intervention of a jury, there must be findings of fact upon all the material issues presented by the pleadings. There being no finding upon this issue, it must be presumed that it escaped the attention of the Court.' "

Both of these cases are cited with approval in *Jameson vs. Coldwell*, 25 Ore. 199-205; 35 Pac. 245. To the same effect are *Breeding vs. Williams*, 33 Ore.

393; 54 Pac. 206, and *Lewis vs. Bank* 46 Ore. 187; 78 Pac. 990. Therefore, we conclude that the question was properly before the Court.

It is further contended that the Findings of Fact as made by the Court are not, in fact, Findings of Fact, but are in reality mere conclusions of law.

Kane vs. Rippey, 22 Ore. 299; 29 Pac. 1005.

In the above cited case, the Court made Findings of Fact that an abstract furnished by defendant to plaintiff does not show any legal defect or encumbrances, and there are none in fact. The Court, therefore, finds as a conclusion of law, that the plaintiff is not entitled to recovery in the action, and that defendants are entitled to recover costs. The Supreme Court of the State of Oregon, in making its decision, said:

"The seventh finding recites that the title is good, and the eighth that the abstract furnished to plaintiff does not show any legal defects or encumbrances and there are none in fact. These are not findings of fact but naked legal conclusions. The Court cannot deduce from them any legal consequences, because they are in themselves legal conclusions. What deeds there are

in the chain of title and the manner and form of their execution are questions of fact. Whether or not they vest in the defendant a good title is a question of law. What was contained in the abstract is a question of fact. Whether those facts showed any legal defects or encumbrances are questions of law. These principles are so elementary that they need no citations of authority to fortify them. From the record before us, it is impossible to determine upon what legal theory the Court below proceeded in the trial, but it is manifest that proper attention was not given to the former opinion of the Court in this cause. For that reason and because the findings of fact are entirely defective and insufficient to justify the judgment rendered, the same must be reversed."

The record in itself shows what issues were before the Court, and what findings the Court made upon the issues. The Court utterly ignored all of the material issues in the case except one, which was whether or not the defendant was at any time engaged in interstate commerce. For that reason, as shown by the cases cited above, the judgment is defective because there are no Findings of Fact from which a conclusion of law may be drawn. The record

does not show any decision by the Court upon the other material issues of the case.

The plaintiff in error does not seek to reverse this case for any technical errors, if any there may be, committed during the course of the trial of the cause, but, on the contrary, seeks merely a judgment in the case to be determined by the evidence, by sufficient findings, and by the law. In each of those particulars, we are of the opinion that the trial court has failed to render a just judgment and the error is not one that can be particularized and which rests upon mere technicalities, but it underlies the entire judgment of the Court. The Court in making its decision cited but one case, which the plaintiff in error contends was not in point and could not be used to determine the issues of the case, and has ignored numbers of decisions which would support a judgment for the plaintiff.

For the reasons hereinabove set forth, we respectfully urge that the judgment ought to be reversed and remanded for a new trial.

Respectfully submitted,

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Assistant United States Attorney
for Oregon.

IN THE ¹²

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

COLUMBIA & NEHALEM RIVER RAILROAD
COMPANY,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District
Court for the District of Oregon

R. W. WILBUR,
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Attorneys for Defendant in Error.

IN THE

**United States Circuit Court
of Appeals**

For the Ninth Circuit

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STATEMENT OF THE CASE

The pertinent facts in this case are stated very clearly in the Trial Court's opinion (Transcript p. 17), and in the statement of the case contained in the brief of the plaintiff in error and we desire to add very little thereto. It is to be borne in mind that the defendant in error, although a common carrier of freight under the law of Oregon, was essentially and primarily a logging road, constructed and operated for that purpose only and it had or maintained no equipment of any kind in which freight could be shipped in intra or interstate commerce. Aside from the engines, the defendant had no freight cars other than three flat cars and one stock car. (Transcript, p 59.) Logs constituted 95 per cent of the freight taken over defendant's lines. Not over one per cent of the freight which is picked up by the S. P. & S. at Kerry and which has been transported over the defendant's line is shipped outside of the State of Oregon. The shippers on defendant's line deal directly with the S. P. & S. and in bringing the bills of lading to Kerry and placing them in the box alongside the right of way of the S. P. & S., the defendant acted in all cases only as a messenger of the consignors (Transcript, p. 71). There is no town at Kerry where the dispatcher's office is and

there are no stations on defendant's line or any agents at any place other than Kerry. The dispatcher lived in a room above his office and whether he was on duty or not, he spent his evenings in the office reading the paper and, as testified to by him, he would not consider the office closed or that he was off duty until he locked the office and went upstairs to bed (Transcript, pp. 66, 67, 80). The ordinary movement of logging trains over defendant's line took place between seven A. M. and six P. M. (Transcript, p. 73). During the year 1919, as testified to by Mr. Cochran, auditor of defendant, trains could have been tied up so that no further dispatching was necessary on an average not later than 8:00 or 8:30 P. M.

ARGUMENT

I.

As stated in the brief of plaintiff in error, on pages 9 and 10:

“Errors complained of by the plaintiff in error are all of them general in nature and regard the sufficiency of the findings to support the judgment, and the failure of the evidence to sustain the findings made by the court.”

At the conclusion of the case, the plaintiff orally moved the court for a judgment upon the testimony

on the ground that the uncontradicted testimony supported the allegations set forth in the complaint (Transcript, p. 80), which motion the court overruled and this is the first error specified by plaintiff in error (Transcript, p. 42). No exception was asked by plaintiff and none allowed by the court to this ruling. Assignments of Error II., III., IV., V. and VI. are to the effect that the Findings of Fact as made by the court are not sustained by the evidence. Assignments of Error VII., VIII., IX., X. and XI. are to the effect that the Findings of Fact as made by the court are not sustained by law and Assignments of Error XII. to XXV. inclusive are for the reason that the court declined to make Findings as requested by the plaintiff, which special Findings were not presented to the court until December 13, 1920, while the Findings as made by the court and the judgment were entered on August 16, 1920 (Transcript, p. 81). At the time the trial court made its Findings of Fact and Conclusions of Law no exception was asked or allowed thereto by the plaintiff.

It is the contention of the defendant that on this state of the record there is nothing for this court to review. As to each of the causes of action set forth in the complaint, the trial court made a general Finding that the defendant was not at any of the times mentioned in the complaint engaged in interstate commerce and, as a conclusion of law, that the defend-

ant is not subject to the Act of Congress mentioned in the complaint and that the plaintiff was not entitled to recover upon any of its causes of action (Transcript, pp. 24, 25).

The plaintiff in error in its brief cited Section 172 of Oregon Laws and also a number of decisions of the Supreme Court of Oregon as to the practice to be followed in a trial before the court without the intervention of a jury but this section of the Oregon Laws and the cases cited in plaintiff's brief and relied upon by it are absolutely without any application to this case or to any trial by a Federal Court without a jury.

These matters are specifically covered by Statutes of the United States.

Section 649 of the Revised Statutes is as follows:

"Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700 of the Revised Statutes provides:

"When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court

without the intervention of a jury, according to Section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Section 649 provides that the Finding of the Trial Court may be either general or special and that whether general or special Findings are made, they shall have the same effect as the verdict of a jury; while Section 700 provides that the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the Appellate Court and when the Finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.

In this case the court made a general Finding as to each of the causes of action alleged in the complaint to the effect that the defendant was not engaged in interstate commerce and hence this Finding has the same effect as the verdict of a jury would have had, and this court will not examine the evidence for the purpose of determining whether the facts as found are warranted by the evidence. There were no ex-

ceptions taken during the progress of the trial and as the court made a general Finding, there is absolutely nothing for this court to review or pass upon. Under Section 700 of the Revised Statutes, even if the Finding of the court had been special, the only thing that this court, under the present state of the record would be called upon to determine would be whether or not the facts as found by the Trial Court were sufficient to support the judgment. There is no doubt but that the Findings of the court were general Findings and they were so considered by the Trial Court (Transcript, p. 81).

On the trial of an action at law without a jury, it is discretionary with the court to make either general or special Findings of Fact and it is not error for the court to refuse to make special Findings.

Miller vs. Life Ins. Co., 12 Wall. 285-297.

Insurance Co. vs. Folsom, 18 Wall. 237-249-250.

British Queen Min. Co. vs. Baker Silver Min. Co., 139 U. S. 22.

State Nat. Bk. vs. Smith, 94 Fed. 605.

Wright vs. Bragg, 96 Fed. 727-731.

Berwind-White Coat Min. vs. Martin, 124 Fed. 313-314.

School Dist. No. 11 vs. Chapman, 152 Fed. 887-894.

In the case of Insurance Co. vs. Folsom cited above, the Circuit Court refused the request of counsel to make any special Findings of Fact and counsel for defendant then and there took an exception to the refusal of the Trial Court to make special Findings. In discussing Section 649 of the Revised Statutes, the court said:

“Propositions of fact found by the court, in a case where the trial by jury is waived, as provided in the Act of Congress, are equivalent to a special verdict, and the Supreme Court will not examine the evidence on which the Finding is founded, as the Act of Congress contemplates that the finding shall be by the Circuit Court; nor is the Circuit Court required to make a special Finding, as the act provides that the Finding of the Circuit Court may be either general or special, and that it shall have the same effect as the verdict of a jury.”

The same rule is laid down in School Dist. No. 11 vs. Chapman, 152 Fed. 887-894, where the court said:

“When the trial is to the court, without the intervention of a jury, whether the Finding shall be general or special rests in the discretion of the court in like manner as it rests in its discretion, when the trial is with a jury, to require that the verdict be general or special. The Statute (Rev. St. U. S. Sec. 649—U. S. Comp. St. 1901, p. 525),

declares that the Finding 'may be either general or special,' but it does not give to one of the litigants the right to determine which it shall be."

All of the authorities cited above are of the same tenor and hold that it was discretionary with the Trial Court to make either general or special Findings and that error cannot be predicted upon the court's refusal to make special Findings of Fact even though the request for special Findings is made during the progress of the trial. With much more reason, therefore, can it be said that the plaintiff in this case cannot predicate error upon the refusal of the court to make the special Findings which were presented to the court and upon which the court was asked to find several months after the Findings had been made and the judgment entered. The fact that the plaintiff took different orders of the court allowing it time within which to file objections to the Findings as made and make requests for other and different Findings avails the plaintiff nothing.

No question is presented for review by the Appellate Court where a jury is waived and the Finding of the court was general and no bills of exception were taken to the rulings of the court during the progress of the trial.

Hughes County vs. Livingston, 104 Fed. 306.

National R. Co. of Mexico vs. O'Leary, 126 Fed. 1. c. 363.

York vs. Washburn, 129 Fed. 564-566.

Jackson vs. Mutual Life Ins. Co., 186 Fed. 447-449.

In the case of Hughes County vs. Livingston cited above, the court said on page 319 of the opinion:

“Where a jury is waived, and there is testimony raising a controversy, and the court finds generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence.”

To the same effect is York vs. Washburn, 129 Fed. 564, in which case the court cited a large number of authorities on this question and in its opinion, on page 566, said:

“That which the record discloses is nothing more than a general Finding of all the issues in favor of defendant, but, whether the Finding be general or special, it has the same effect as the verdict of a jury, and, in the circumstances in which it was given, is conclusive, and prevents any inquiry in this court as to whether it is sustained by the evidence. Norris vs. Jackson, 9 Wall, 125, 19 L. Ed. 608; Martinton vs. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed.

862; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; *Dooly vs. Pease*, 180 U. S. 126-131, 21 Sup. Ct. 329, 45 L. Ed. 457; *Wilson vs. Merchants Loan & Trust Co.*, 183 U. S. 121-127, 22 Sup. Ct. 55, 46 L. Ed. 113; *Mercantile Trust Co. vs. Wood*, 8 C. C. A. 658, 60 Fed. 346; *Walker vs. Miller*, 8 C. C. A. 331, 59 Fed. 869; *Hughes County vs. Livingston*, 43 C. C. A., 541-555, 104 Fed. 306; *Barnard vs. Randle*, 49 C. C. A. 177, 110 Fed. 906."

Where a jury is waived and the court finds generally, nothing is open to review by the losing party under writ of error except rulings of the court in the progress of the trial and that phrase does not include general Findings of the court nor Conclusions of the court embodied in such general Findings.

Norris vs. Jackson, 9 Wall. 125.

Miller vs. Insurance Co., 12 Wall. 285-297.

Dirst vs. Morris, 14 Wall. 484.

Insurance Co. vs. Folsom, 18 Wall. 237-248.

Cooper vs. Omohundro, 19 Wall. 65.

Lehnen vs. Dickson, 148 U. S. 71-73.

City of Key West vs. Baer, 66 Fed. 440-442.

Distilling & Cattle Feeding Co. vs. Gottschalk Co., 66 Fed. 609.

A very clear statement of the effect of both general and special Findings in a trial by the court is con-

tained in the case of *Lehnen vs. Dickson*, cited above, and we quote from page 73 of the opinion as follows:

“Sections 648 and 649 of the Revised Statutes, while committing generally the trial of the issues of fact to a jury, authorize parties to waive a jury and submit such trial to the court, adding that ‘the Finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.’ But the verdict of a jury settles all questions of fact. As said by Mr. Justice Blatchford, in *Lancaster vs. Collins*, 115 U. S. 222, 225: ‘This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered.’ The Finding of the court, to have the same effect, must be equally conclusive and equally removed from examination in this court the testimony given on the trial. *Insurance Co. vs. Folsom*, 18 Wall. 237; *Cooper vs. Omohundro*, 19 Wall. 65. Further, Section 700 provides that ‘when an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to Section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a Bill of Exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the Finding is special,

the review may extend to the sufficiency of the facts found to support the judgment.' Under that, the rulings of the court in the trial, if properly preserved, can be reviewed here, and we may also determine whether the facts as specially found support the judgment; but if there be no special findings, there can be no inquiry as to whether the judgment is thus supported. We must accept the general Finding as conclusive upon all matters of fact, precisely as the verdict of a jury. *Martinton vs. Fairbanks*, 112 U. S. 670."

Two very clear and instructive cases as to the proper method of saving questions to be reviewed by the Appellate Court, where a trial is had before the court without a jury, are those of *Mercantile Trust Co. vs. Wood*, 60 Fed. 346, and *Humphreys vs. Third National Bank*, 75 Fed. 852.

Judge Sanborn of the Eighth Circuit, in *Mercantile Trust Co. vs. Wood*, said:

"The only question the special Finding presents that would not be presented by a general Finding is whether or not, in any view, the facts found in it are sufficient to support the judgment. With the single exception of this question, which is presented by the special Finding itself, there are only two methods by which questions of law can be so presented to the court that tries the

facts that this court can review them by writ of error. These methods are, first, by seasonable objections and exceptions to the ruling of the court upon the admission or rejection of evidence, and, second, by requesting the court, before the trial is ended, to make declarations of law, and excepting to its refusal to do so, and to its declarations of law, if any, that do not accord with the propositions asked, in exactly the same way as instructions to a jury would be requested, and the rulings of the court giving or refusing them would be excepted to, if the trial was before a jury. The Finding of the court, whether general or special, performs the office of a verdict of a jury. When it is made and filed, the trial is ended. Exceptions to the Finding, or to statements of legal conclusions contained in it, or in an opinion in which it is contained, or in an opinion filed with it, avail nothing. They are as futile as exceptions to the verdict of a jury. When a case comes to this court upon a writ of error, this is a court for the correction of the errors of the court below solely. To enable us to review these errors in a case tried by the court it must appear that the legal propositions on which they rest were presented to that court and ruled upon before the trial ended, unless they are involved in the single question whether or not the facts found in a special Finding are sufficient to support the judgment. It is, in the words of the Statute, 'the rulings of the court in the progress of the trial of the case,' and these only, that

we are authorized to review, unless such rulings are involved in the single question we have mentioned. *Clement vs. Insurance Co.*, 7 Blatchf. 51, 53, 54, 58 Fed. Cas. No. 2882; *Walker vs. Miller*, 59 Fed. 869; *Bowden vs. Burham*, Id. 752; *Norris vs. Jackson*, 9 Wall. 125, 127; *Insurance Co. vs. Folsom*, 18 Wall. 237, 249; *Cooper vs. Omohundro*, 19 Wall. 65, 69; *Martinton vs. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321; *Lehnen vs. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481.

“No requests for any declarations of law were made in this case, and the only question raised by the proceedings at the close of the trial is whether or not the facts found by the special Finding contained in the opinion of the court are sufficient to sustain the judgment.”

The opinion in the case of *Humphreys vs. Third National Bank*, 75 Fed. 852, was written by Judge Taft and, among other things, he said:

“The Finding in favor of the plaintiff below was a Finding which involved mixed questions of law and fact, and it was general in its form. It is well settled that in such a case nothing is open to review in this court except the rulings of the Trial Court in the progress of the trial, and that such rulings do not include the general Finding of the Circuit Court, which performs the office and has the effect of a verdict of a jury; that is to say, it is conclusive as to the facts found. The

strictness with which this rule is enforced is clearly set forth in the opinion of Judge Lurton speaking for this court in *Insurance Co. vs. Hamilton*, 22 U. S. App. 386, 11 C. C. A. 42, and 63 Fed. 93, where all the decisions of the Supreme Court upon the subject are fully reviewed. This practice in the Federal Courts of Appeal differs from that in the State Courts of this circuit where it is open to counsel on writ of error by exception to a general Finding to raise the question in the Appellate Court of the sufficiency of the evidence as a matter of law to sustain such Finding. We fear that this difference in the practice is not sufficiently well known to counsel, and we think that their attention should be especially directed to the very technical and severe rule of the Federal Appellate Courts in this respect. When a party in the Circuit Court waives a jury, and agrees to submit his case to the court, it must be done in writing; and if he wishes to raise any question of law upon the merits in the court above he should request special Findings of Fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special Findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits. A general Finding in favor of the party is treated as a

general verdict. A general verdict cannot be excepted to on the ground that there was no evidence to sustain it. Such a question must be raised by a request to the court to direct a verdict on the ground of insufficiency of the evidence. If the views which the court takes of the law are deemed to be prejudicial to a party, he is required to except to the charge at the time that it is delivered, indicating those parts of it to which he objects. Where a cause is submitted to the court, however, the court cannot, in the nature of things, charge itself, and therefore no opportunity is presented to the party objecting to the views which the court entertains of the law to take his exceptions, unless he procures special Findings of Fact to be made and special conclusions of law to be drawn therefrom. We regret that in a number of cases brought before us the submission of a law case to a court upon stipulation has proved a trap to counsel in this court, and we say what we have with the hope that it may direct the attention of those who shall bring cases here in the future to the fact that great care must be taken in the preparation of a case for error proceedings, when no jury intervenes. The result in this case is that the general Finding in favor of the plaintiff cannot be disturbed, because it involves a mixed question of law and fact, and is not reviewable here. We can only examine the rulings of the court on the evidence as shown in the bill of exceptions."

After a careful examination of the authorities, we have been unable to find where the doctrines enunciated by the above cited cases have been in any way modified or overruled. In fact, the two sections of the Revised Statutes governing this matter are plain and unambiguous. Under neither Statute has this court the right to review the evidence and in a case where the Finding of the court is special, the Appellate Court will only examine the Findings for the purpose of determining whether or not they are sufficient to support the judgment. The Finding of the Trial Court in this case was that the defendant was not engaged in interstate commerce and this fact being true, the case of the Government thereby fell of its own weight.

On page 27 of plaintiff's brief, it complains that the Findings of Fact made by the court are mere Conclusions of Law and therefore do not sustain the judgment. The Findings of the court that the defendant is not engaged in interstate commerce are Findings of Fact under the decisions of the Supreme Court of the United States. It is true that whether or not the railroad is engaged in interstate commerce may be a mixed question of law and fact but the determination of this question is nevertheless based upon the facts. This doctrine is laid down in *Railroad Commission of Ohio vs. Worthington*, 225 U. S. 101 and *Southern Pacific Co. vs. State of Arizona*, 249 U. S. 472, and also in a case decided by the Supreme Court

of the State of Oregon, where practically all of the decisions of the United States Supreme Court are reviewed, the case being *Service vs. Sumpter Valley Railway Co.*, 88 Ore. 554, 576.

In the case of *Southern Pacific Co. vs. State of Arizona*, Mr. Justice Clarke, who wrote the opinion, said:

“Whether a shipment was at a given time interstate commerce is a question of fact, *Railroad Commission of Ohio vs. Worthington*, 225 U. S. 101, 108; 32 Sup. Ct. 653, 656, L. Ed. 1004;
* * *

The case of *Service vs. Sumpter Valley, Ry. Co.*, 88 Ore., was a trial before a jury and the question at issue was whether or not certain shipments were intra-state or interstate commerce and under the evidence produced the court left the determination of this fact to the jury on the ground that it was a question of fact to be passed upon by them and on page 577 of the opinion, the following language was used:

“In our judgment there is at least some testimony to be considered on both sides of the question about interstate commerce; and, however, great the preponderance in its favor as estimated by the defendant, we cannot say that its showing is so conclusive as rightly to call from the Trial Court a peremptory direction to the jury to find against the plaintiff on that point.”

We submit, therefore, that under the two sections of the Revised Statutes, and the authorities above cited, the provisions of the Oregon Law and the decisions of the State Supreme Court as to the manner of preserving and presenting questions of law to be reviewed in the Appellate Court, have no bearing whatever on this case and further that on the record in this case this court has nothing to do other than to affirm the judgment of the Trial Court without examining into the issues of the case.

II.

The defendant was not engaged in interstate commerce under the facts of this case.

Coe vs. Errol, 116 U. S. 517.

Gulf, C. & S. F. R. Co. vs. Texas, 204 U. S. 403.

N. Y. Cent. Ry. Co. vs. Mohny, 252 U. S. 152.
U. S. vs. Geddes, 131 Fed. 452.

Settle vs. Baltimore & O. S. W. R. Co. 249 Fed. 913.

Chicago M. & St. P. R. Co. vs. Iowa, 233 U. S. 334.

So. Pac. Co. vs. Arizona, 249 U. S. 472.

Public Utilities Commission for State of Kansas vs. Landon, 249 U. S. 236.

It must be borne in mind that in most of the cases dealing with the question as to whether or not a certain shipment is intra-state or interstate, it is conceded that the carrier is engaged in interstate commerce and in a great majority of cases, the railroad in question issues through bills of lading and has traffic arrangements and agreements with other railroads for the division of charges. No such state of facts exist in this case. The defendant issued no through bills of lading, had no schedule of through rates or traffic arrangements with any other road and had no conventional agreement for the division of charges and was treated by the S. P. & S., the only railroad connecting with the defendant's line as an ordinary shipper and was charged demurrage on cars the same as any other shipper would be. It is the contention of the defendant in this case and was so decided by Judge Bean that in transporting a shipment from a point on the defendant's line to Kerry, the defendant was acting simply as a forwarding agent and that any shipment that was destined for points outside the State of Oregon did not take on an interstate character until the shipper made arrangements with the S. P. & S. for shipment from Kerry to the point of destination. The defendant is essentially a logging railroad and, as shown by the statement of facts in the bill of exceptions (Transcript, p. 70), it was not originally contemplated that the road should be a common carrier but it was found necessary, in

order to secure rights of way, to incorporate as a common carrier of freight and under the law of the State of Oregon, it was required to accept any freight shipments that were offered to it, but it had a perfect right to limit its carriage and its responsibility to its own line and this it did. The Statutes of the State of Oregon which impose the duty of transporting all freight offered to defendant upon payment of reasonable compensation therefor, are Sections 7080 and 7081 of Olson's Oregon Laws, which sections are as follows:

“Any corporation organized for the purpose of opening or operating any gold, silver or copper vein or lode, or any coal or other mine; or any marble, stone or other quarry; or for cutting or transporting timber, lumber or cordwood, or for the manufacture of lumber shall have the right to construct and operate railroads, skid roads, tramways, chutes, and flumes between such points as may be indicated in their articles of incorporation, and shall have a right to enter upon any land between such points for the purpose of examining, locating and surveying the line of such railroads, skid roads, tramways, chutes and flumes, doing no unnecessary damage thereby, and such corporation shall have power to appropriate so much of said land as may be necessary for the same, not exceeding sixty feet in width, and may maintain an action for the appropriation thereof in the manner and form as

by law provided by any railway, macadamized road, plank road, clay road, canal or bridge, and with like effect.

“Any such railroads, skid roads, tramways, chutes, flumes, shall be deemed to be for public benefit, and any such railroad so constructed, and operated shall afford to all persons equal facilities for the transportation of freight upon payment or tender of reasonable compensation therefor, but said railway shall not be required to carry passengers; and any such skidway, tramway, chute or flume shall afford to all persons equal facilities in the use thereof for the purpose to which they are adapted, upon tender or payment of the reasonable compensation for such use.”

These sections of the Statute are declaratory of the common law duty of a common carrier.

In the case of *Myrick vs. Mich. Cent. R. Co.* 107 U. S. 102, Mr. Justice Field said on page 106 of the opinion:

“A railroad company is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are entrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees.”

There is no law, state or federal, that could require the defendant to assume any responsibility for any carriage other than over its own lines and it had a perfect right so to limit its business.

In reading the decisions on this question, one is struck forcibly with the fact that in determining whether or not a particular shipment is interstate, all of the surrounding facts and circumstances are taken into consideration and, as we have stated above, the determination of this question is an issue of fact. The line of demarcation is not always free from difficulty as pointed out in the late case on this subject of *Settle vs. Baltimore & O. S. W. R. Co.*, 249 Fed. 913, which will be hereafter referred to.

The case of *Coe vs. Errol*, 116 U. S. 517, which case was cited in Judge Bean's opinion, although a case which arose over the question of whether or not certain logs were taxable, is one that has been frequently cited on this question of interstate shipments both by the Circuit and Supreme Courts, and in the opinion, the court used the following language:

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are

committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state * * *

“It is true, it was said in the case of the *Daniel Ball*, 10 Wall. 557, 565: ‘Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.’ But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commerce is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm, or the forest, to the depot, is only an anterior movement of the property, entirely within the state, for the purpose it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri, and not at all a fixed and certain thing.”

This case in our opinion is controlling of the present case. The defendant in this case simply brought the merchandise to Kerry for shipment, and it was then, and not until then, that it started on its interstate journey. The consignor could have diverted the shipment from Kerry to any point within the state or so far as we are concerned, could have unloaded the same and stored it at Kerry without shipping it further as the car at Kerry was in the control and possession of the consignor and subject to his orders and disposition. It is true that neither the form of the billing nor the intention of the shipper are solely determinative of the question and the rule is laid down in a number of decisions by the Supreme Court that it is the essential character of the commerce that should determine the question.

In the case of *Gulf, Col. & S. F. Ry. Co. vs. State of Texas*, 204 U. S. 403, a carload of corn was shipped from a point in South Dakota and was billed to Texarkana, Texas. It was the intention of the owners of the corn at all times to ship the same to Goldthwaite, Texas, and the reason same was billed to Texarkana instead of Goldthwaite was that by paying the freight from South Dakota to Texarkana and then the local rate from Texarkana to Goldthwaite, a cheaper freight rate could be secured than by making the through shipment from South Dakota to Goldthwaite. When the carload of corn reached Texarkana, it was

not unloaded but was delivered to another carrier and rebilled from Texarkana to Goldthwaite. The State of Texas brought an action against the railroad company for a penalty and the question to be decided was whether or not the shipment from Texarkana to Goldthwaite, under the facts, was an intra-state or interstate shipment. The Supreme Court held that the shipment was not interstate and, among other things, said:

“When the Hardin company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligation to carry it further. It transferred the corn, in obedience to the demands of the owner, to the Texas & Pacific Railway Company, to be delivered by it, under its contract with such owner. Whatever obligations may rest upon the carrier at the terminus of its transportation to deliver to some further carrier, in obedience to the instructions of the owner, it is acting not as carrier, but simply as a forwarder. No new arrangement having been made for transportation, the corn was delivered to the Hardin company at Texarkana. Whatever may have been the thought or purpose of the Hardin company in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned.

“In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased

at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled, on his arrival at Texarkana, to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the state within which that carriage was to be made.

“The question may be looked at from another point of view. Supposing a car load of goods was shipped from Goldthwaite to Texarkana under a bill of lading calling for only that transportation, and supposing that the laws of Texas required, subject to penalty, that such goods should be carried in a particular kind of car—can there be any doubt that the carrier would be subject to the penalty, although it should appear that the shipper intended, after the goods had reached Texarkana, to forward them to some other place outside the state? To state the question in other words—if the only contract of shipment was for local transportation, would the state law in respect to the mode of transportation be set one side by a Federal law in respect to interstate transportation, on the ground that the shipper intended, after the one contract of shipment had been completed, to forward the goods to some

place outside the state? *Coe v. Errol*, 116 U. S. 517-527, 29 L. Ed. 715-718, 6 Sup. Ct. Rep. 475.

“Again it appeared that this corn remained five days in Texarkana. The Hardin company was under no obligation to ship it further. It could, in any other way it saw fit, have provided corn for delivery to Saylor & Burnett, and unloaded and used that car of corn in Texarkana. It must be remembered that the corn was not paid for by the Hardin Company until its receipt in Texarkana. It was paid for on receipt and delivery to the Hardin Company. Then, and not till then, did the Hardin Company have full title to and control of the corn, and that was after the first contract of transportation had been completed.

“It must further be remembered that no bill of lading was issued from Texarkana to Goldthwaite until after the arrival of the corn at Texarkana, the completion of the first contract for transportation, the acceptance by the Hardin Company. In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it has made, know whether it was bound to obey the state or Federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract. It must be remembered that there is no presumption that a transportation when commenced is to be continued beyond the state limits,

and the carrier ought to be able to depend upon the contract which it has made; and must conform to the liability imposed by that contract."

This case has been cited and approved in practically all of the decisions of the Supreme Court on this subject rendered subsequent to the handing down of this opinion.

The latest decision of the Supreme Court on this question that we have found is that of *N. Y. Cent. R. Co. vs. Mohney*, 252 U. S. 152. In this case an employee of the railroad had a pass which was good between certain points in the State of Ohio. He desired to make a trip to Pennsylvania due to the death of his mother, and while riding on a train of the Railroad Company and using his pass between Toledo and Cleveland, the train was wrecked and Mohney was seriously injured. His pass contained a release clause which was void under the law of Ohio. He filed suit against the Railroad Company for damages on account of his injuries and the railroad company defended on the ground that Mohney was engaged in an interstate journey and that under the decisions of the Supreme Court of the United States, the release clause was valid. The Court held that although it was Mohney's intention to go on to a point near Philadelphia, Pa., that nevertheless his journey from Toledo to Cleveland was an intrastate journey, the Court basing its opinion on the fact that the only con-

tract between Mohney and the Railroad Company was for transportation from Toledo to Cleveland, the Court saying in its opinion:

“To what extent the analogy between the shipments of property and the transportation of passengers may profitably be pressed, we need not inquire, for in this case the only contract between the carrier defendant and the plaintiff was the annual pass issued to the latter. This written contract, with its release, is the sole reliance of the defendant. But that contract in terms was good only between Air Line Junction and Collingwood, over a line of track wholly within Ohio, and the company was charged with notice when it issued the pass that the public policy of that state rendered the release upon it valueless. * *

“The contract which the defendant had with its passenger was in writing and was for an intrastate journey, and it cannot be modified by the purpose of Mohney to continue his journey into another state, under a contract of carriage with another carrier, for which he would have been obliged to pay the published rate, or by an intended second contract with the defendant in terms which are not disclosed. The mental purpose of one of the parties to a written contract cannot change its terms. *Southern Pacific Co. v. State of Arizona*, 249 U. S. 472, 39 Sup. Ct. 313, 63 L. Ed. 713. For these reasons the judgment of the Trial Court was right and should have been affirmed.”

In the case of *Chicago, M. & St. P. Ry. Co. vs. State of Iowa*, *supra*, cars of coal were shipped from without the state to Davenport, Iowa. The consignee of the coal did not unload same but made application to the plaintiff railroad company for transportation of the coal from Davenport to other points in Iowa. The Court held that the transportation of the coal from Davenport, Iowa, to other points in Iowa would be an intrastate shipment and the fact that the carloads of coal came from points outside the state would not establish such continuity of transportation as to make the reshipment interstate commerce. The Court said:

“But the fact that commodities on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement, or prevent the reshipment to a point within the same state from having an independent and intrastate character. *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 51 L. Ed. 540, 27 Sup. Ct. Rep. 360; *Railroad Commission v. Worthington*, 225 U. S. 101, 109, 56 L. Ed. 1004, 1008, 32 Sup. Ct. Rep. 653; *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 129, 130, 57 L. Ed. 442, 449, 450, 33 Sup. Ct. Rep. 229. The question is with respect to the nature of the actual movement in the particular case; and we are unable to say upon this record that the state court has improperly characterized the traffic in question here.”

A late case is that of *Settle vs. Baltimore & O. S. W. R. Co.*, 249 Fed. 913, decided by the Circuit Court of Appeals, Sixth Circuit, in 1918. Practically all of the decisions of the Supreme Court are reviewed at length in this opinion. The case involved the question as to the proper rate to be charged for certain shipments of lumber. All of the lumber originated south of the Ohio River and was billed to Oakley, Ohio, a suburb of Cincinnati, and it was the defendant's intention from the time of the original shipments to finally have the lumber shipped and delivered to them at Madisonville, Ohio. The interstate rate was paid from the shipping point to Oakley and upon the arrival of the lumber at Oakley, the same was rebilled to Madisonville in the same state without the lumber being unloaded or in any manner disturbed. The interstate rate from the point of origin to Madisonville in each case exceeded the sum of the interstate rate and the local rate from Oakley to Madisonville and the defendants took the course they did simply for the purpose of getting lower rates. Under these facts, the Court held that the shipment from Oakley to Madisonville was an intrastate shipment and in the opinion said:

“We are not cited to, nor have we found, any cases more favorable to plaintiff's contention than those we have discussed. Neither of these cases is on all fours with the instant case. In the three water carriage cases the shipments could

not move beyond the port in question except in interstate or foreign commerce. In none of the cases cited was an actual deliverery to the consignee, previous to reshipment, made or attempted. In at least two of the cases a lack of such delivery is emphasized. None of them involved the feature of making payment of actual demurrage charges for delay before reshipping. In one of them, as we have seen, the absence of payment or tender of such charge was commented upon, and in another the fact of the actual allowance of additional free time because of the nature of the shipment. All of them seem to have turned, expressly or impliedly upon the question of continuity of movement, actual or constructive.

“Is the instant case distinguished from the cases cited? The petition contains, as we have seen, an express averment of defendants’ order for the delivery of the cars to them at Oakley, an implied averment of such delivery there on the team tracks, express averments of demurrage charges for detention thereof, the receipt by defendants of the lumber at Oakley, and a subsequent reshipment to Madisonville—*prima facie* indicating a physical possession taken by defendants at Oakley; the mere fact that removal of the lumber from the cars at Oakley was not required does not impress us as enough to convert, as matter of law, an otherwise actual delivery into one merely constructive, colorable or evasive. Considering the petition as a whole, we think its

natural construction is that while defendants intended ultimately to receive and use the lumber at Madisonville, and so to reship from Oakley, yet the latter point was regarded by both parties as the ultimate destination and place of delivery of the particular shipment itself, as distinguished from the ultimate destination of the lumber. There is no averment of a rebilling while the lumber was in transit, nor that any of the shipments were or could have been handled, after rebilling at Oakley, in the same train which brought them into Cincinnati, so making an actually continuous shipment, as in the *Kanotex* case. Indeed, the petition, by necessary implication, negatives a continuous movement in fact. The fact that defendants obtained switching from Cincinnati to Oakley does not indicate that they were getting something for nothing. The switching was not 'free;' the charge therefor was merely absorbed in the rates from the southern point to Cincinnati.

"A new shipment by a consignee of an interstate shipment in the cars in which received to other points of destination does not necessarily establish continuity of movement or prevent reshipment to a point within the same state from having an independent and intrastate character. *Gulf, Colorado & S. F. Ry. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540—the *Texarkana* case; *C. M. & St. P. Ry. Co. v. Iowa*, 233 U. S. 334, 343, 34 Sup. Ct. 592, 58 L. Ed. 988. In the former of these

cases it was held that the interstate shipment (in that case carload lots) on reaching the point specified in the original contract of transportation ceased to be an interstate shipment, and that its further transportation to another point within the same state, on the order of the consignee, is controlled by the law of the state and not by the interstate commerce act. In the other case it was held that shipments of coal when reshipped after arrival from points without the state (and acceptance by the consignees) to points within the state on new and regular billing forms constituted intrastate shipments and were subject to the jurisdiction of the state railroad commission. We have not overlooked the fact that in the Texarkana case the consignee did not have full title to and control of the shipment until its arrival at the point of reshipment; nor that in the Iowa case the point beyond which the coal was to be shipped was not determined until after its arrival at the point where the reshipment occurred. In the Ohio Railroad Commission case, *supra*, the Texarkana case was expressly distinguished upon the ground that 'there a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed.' It was similarly distinguished in the Sabine Tram Company case, *supra* (227 U. S. 130, 33 Sup. Ct. 229, 57 L. Ed. 442)—citing the language just quoted—as well as in others of the cases we have discussed. But neither of these two cases has been overruled or criticized."

Defendant in this case had a right to rely upon its contract of shipment with the consignor, which covered carriage only from the point of origin on defendant's line to Kerry.

The mental purpose of the consignor to make arrangements with the S. P. & S. for shipment from Kerry to points outside the State of Oregon could not and should not change the terms of the contract which the defendant had with the consignor. As said in *Southern Pacific Co. vs. State of Arizona*, 249 U. S. 472:

"The mere intention of the shipper to ultimately continue his tour beyond the State of Arizona did not convert the contemplated intrastate movement into one that was interstate."

To the same effect are *N. Y. Central R. Co. vs. Mohny*, 252 U. S. 152; *Gulf, C. & S. F. Ry. Co. vs. Texas*, 204 U. S. 403; *Settle vs. B. & O. S. W. R. Co.*, 249 Fed. 913.

The case of *Pacific Coast Ry. Co. vs. U. S.*, 173 Fed. 448, which is an opinion of this Court, is strongly relied upon by the plaintiff in error as being controlling of the case at bar. The two cases, however, are not similar, the main and controlling difference being that in some instances freight under consideration in that case was billed by the consignor from the point of shipment in another state direct to a

station on the line of the defendant road and in those instances where these were not the facts, the consignor arranged with the Southern Pacific Co. as his agent to rebill the shipments to the point of destination on the defendant's line of road. Judge Gilbert, in discussing the character of the shipment, said, on page 452:

“The plaintiff in error argues that the decision of the Court below rests upon the false premise that to render services to one who is engaged in interstate commerce is to engage in that commerce. But to our view it rests upon a broader basis than this. It rests upon the fact that the movement of the consigned goods to their ultimate destination from the point at which they were shipped in another state was in part conducted upon the road of the plaintiff in error, and that the interstate character of the shipment did not end until the transportation had reached its ultimate completion. The road of the plaintiff in error became a connecting carrier by virtue of the agreement between the consignor and the first carrier, whereby the latter undertook to deliver the goods at San Jose en route to their ultimate destination.”

With all due respect to this Court, we believe that under the authorities of the Supreme Court above cited, the above quoted statement goes too far to be a correct exposition of the law and particularly in the light of the Iowa coal case, 233 U. S. 334, the Texas

case, 204 U. S. 403, the Arizona case, 249 U. S. 472, and the Mohny case, 252 U. S. 152.

The office of the defendant at Kerry was not one continuously operated night and day under the Hours of Service Act. The great preponderance of the evidence in the case shows that the office was operated from 7:00 in the morning until about 8:00 or 8:30 in the evening and hence even if the defendant was engaged in interstate commerce on the days in question, the dispatcher Nash was not on duty over thirteen hours, which is permitted by the statute. All that the statute requires is that the dispatcher be not permitted to work over the required number of hours of service in a 24-hour period. They need not be consecutive hours of work. This is expressly decided in *U. S. vs. Achison, Topeka & S. F. R. Co.*, 220 U. S. 37.

Nash was not even on duty over thirteen hours and was actually working either in his capacity as a dispatcher or as a seller of tickets, a much shorter period of time during each day.

If it is held in this case that the defendant was engaged in interstate commerce, then it is very evident that every common carrier in the United States is an interstate carrier. There is no railroad in the country over which some merchandise is not transported that has either come from without the state

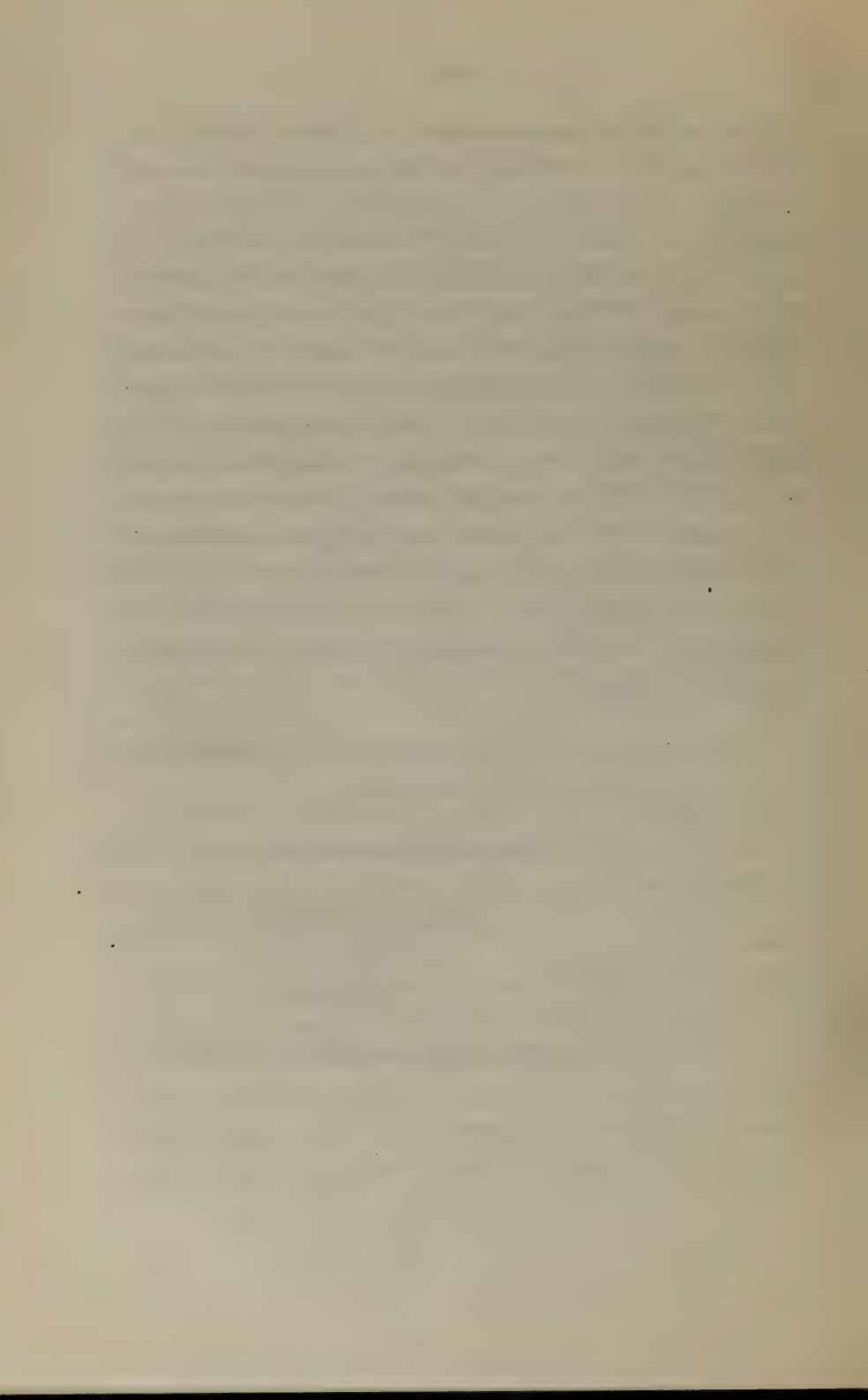
or that is ultimately destined for points beyond the state line, and if so, each and all of these carriers are subject to the Hours of Service Act, the Safety Appliance Act, the Interstate Commerce Act and all other acts of Congress affecting interstate carriers. We cannot believe that under the constitution and the acts of Congress this was intended or can be so. The fact that the defendant, as an accommodation to the logging camps on its line, carried the mail up from Kerry and brought the mail from points on the line down to Kerry without receiving any compensation therefor, has no bearing on the question involved in this case. The mail was all directed to Kerry and was mailed from Kerry. Express was handled the same as the freight shipments, all express being billed to and from Kerry.

For the reasons above set forth the judgment of the Trial Court should be affirmed.

Respectfully submitted,

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No. 3667.

In the United States Circuit Court of Appeals, Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,

v.

COLUMBIA & NEHALEM RIVER RAILROAD COMPANY,
DEFENDANT IN ERROR.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON.

BRIEF FOR PLAINTIFF IN ERROR.

LESTER W. HUMPHREYS,
United States Attorney.

JAMES O. TOLBERT,
Special Assistant to the United States Attorney.

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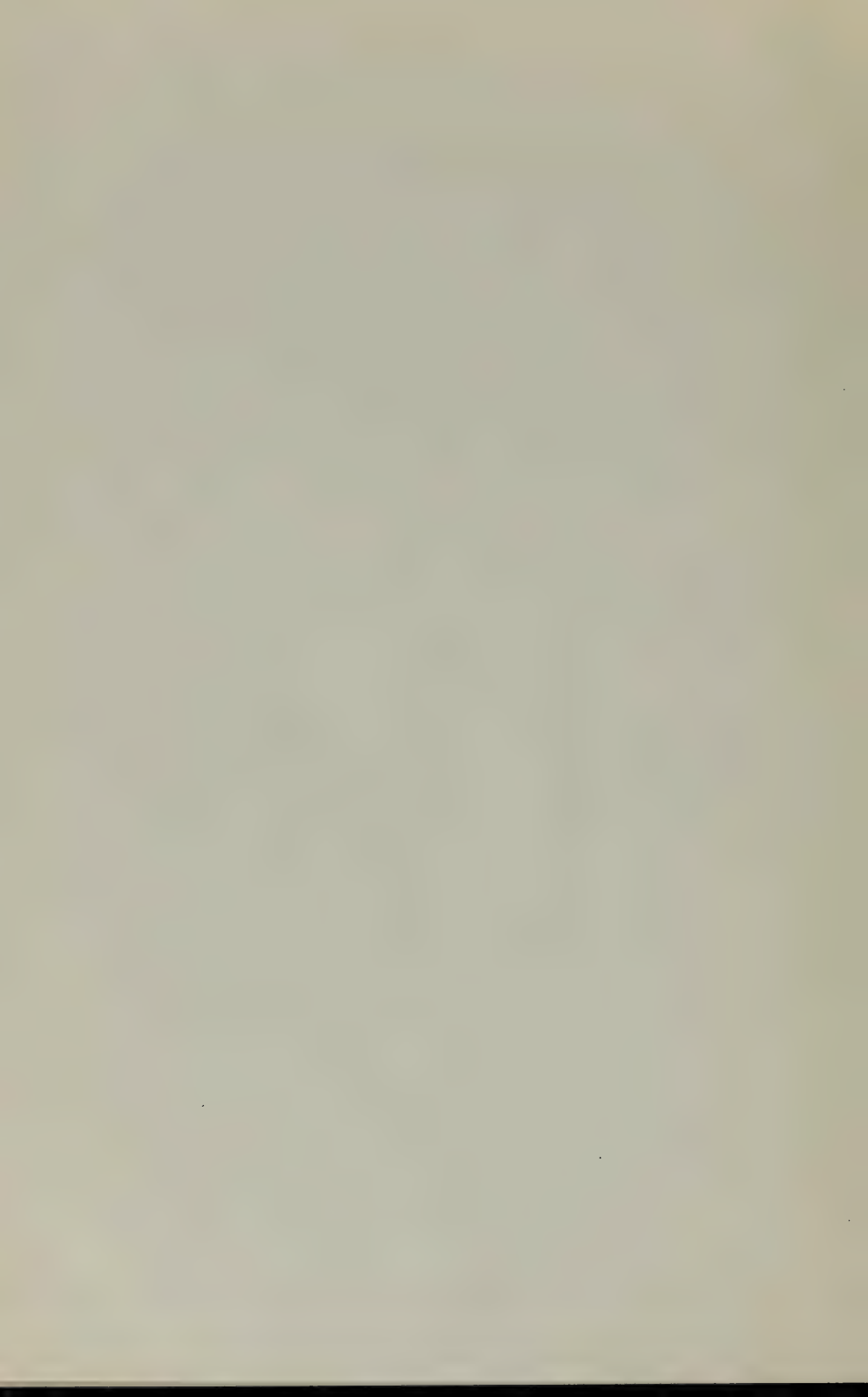
F. D. MONTGOMERY

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In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, plaintiff in error, <i>v.</i> COLUMBIA & NEHALEM RIVER RAILROAD Company, defendant in error.	}	No. 3667.
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*ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

In this case the Government seeks to recover from the defendant penalties for five alleged violations of that provision of section 2 of the Federal Hours of Service Act (34 Stat., p. 1415) relating to telegraph operators, which reads as follows:

Provided, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen

hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period of not exceeding three days in any week.

All the causes of action involve the same telegraph operator at the same station, the only difference being the number of hours he was required to work on the five days in question, which varied each day from 15 hours and 20 minutes to 18 hours and 30 minutes.

The determination of this case involves but one question, and as there is no difference between the several causes of action, so far as the law and undisputed facts are concerned, we will consider the facts in the first cause of action as typical of all.

Briefly, the first cause of action alleges:

(a) That during all the times mentioned therein, the defendant was a common carrier engaged in interstate commerce by railroad in the State of Oregon.

(b) That on September 1, 1919, at Kerry, Oregon, the defendant required and permitted its certain telegraph operator and employee, J. G. Nash, to be and remain on duty for a longer period than nine hours in a twenty-four-hour period, that is, from 6.00 a. m. until 11.50 p. m. that night, a total of 17 hours and 50 minutes.

(c) That the Kerry office was one continuously operated night and day; and

(d) That Operator Nash, while on duty at Kerry, used the telegraph or telephone in dispatching, reporting, transmitting, receiving, and delivering orders pertaining to and affecting the movements of trains engaged in interstate commerce.

The carrier filed a general denial (Rec. 14) and did not attempt to justify the service of Operator Nash by reason of any emergency.

The only real question raised at the trial, and the one the trial court based its decision on, was that relating to the interstate character of the railroad and to the work performed by Nash. In other words, the carrier contended that it was not engaged in interstate commerce, and that the trains, the movements of which were directed by Nash, contained no interstate traffic.

There was some question raised at the trial as to the exact hours worked by Nash, but Nash's positive testimony must be accepted as true as ~~of almost~~ ^{of almost} any indirect insinuating evidence to the contrary.

Upon the one question involved, the facts are as follows:

The defendant's line of railroad is wholly within the State of Oregon, but connects with the Spokane, Portland & Seattle Railroad at Kerry, Oreg., which is an interchange point between the two railroads. The latter maintains no agent at Kerry. The greater part of the traffic handled by the defendant is logs, it carrying about "60 per cent of the commercial

logs on the Columbia River." It was incorporated as a common carrier.

The defendant handled United States mail, freight, and express destined and consigned to points outside the State of Oregon, or which had originated without that State. But, as will be seen, by a device known as rebilling, the defendant endeavored to change the character of a shipment of freight or express while in course of transportation.

In the ordinary course of business, a shipper, when a loaded car was sent to the assembling point, also sent along with it, in case the shipment was destined to some point off the defendant's line, one bill of lading for the defendant, covering carriage from the point of origin to Kerry, the terminus of defendant's line, and a separate bill of lading covering the movement from Kerry to destination over the Spokane, Portland & Seattle Railroad and other railroads. Such shipments would be received by defendant "regardless of whether final destination is in the State of Oregon." Both bills would always be made out by the shipper and were brought by the train crew to defendant's office at Kerry, where the agent of defendant would file the defendant's bill, *note the final destination of shipment as shown by the accompanying S. P. & S. bill*, deposit the latter in a small box, provided for that purpose, near the S. P. & S. station. The car containing the shipment would then be left on a spur of the S. P. & S. at Kerry. The conductor of the next east bound freight train of the S. P. & S. would stop and get the S. P. & S.

bill from the box, pick up the corresponding car from the spur, and take the car to Clatskanie, the next station east of Kerry on the S. P. & S., where the latter's agent would prepare waybills from Kerry to destination. Cars coming in on the line of the defendant, loaded with freight from the S. P. & S., were handled the same as in the case of an ordinary shipper. (Rec. 56, 57.)

The shipper deals directly with the S. P. & S. concerning transportation of shipments from Kerry to final destination. Logs constitute 95 per cent of the freight taken over defendant's line. Practically all of the freight delivered to the defendant by the S. P. & S. at Kerry, for shipment over defendant's line, originates at points in Oregon. Between 40 and 50 per cent of carload shipments, other than logs, originating at points on defendant's line, are destined for points outside the State of Oregon. It was estimated that the amount of business that the S. P. & S. receives at Kerry for transportation outside the State of Oregon would not exceed 1 per cent of defendant's total business. Movements of general freight ordinarily take place two or three times a week so as not to interfere with the logging traffic. (Rec. 58.)

Defendant carried express to and from points along its line. Upon express packages arriving at Kerry addressed to consignee, located on defendant's line, a separate express bill would be made out and separate payment would be made to the defendant for carriage from Kerry to destination. The method of

handling and accounting for express was similar to that of handling and accounting for freight. No shipments were made either to or from points on defendant's line on through express bills. All express arriving from outside points were addressed to the consignee at Kerry and then were rebilled over the line of defendant. (Rec. 59.)

The destination of all foreign cars was determined by reference to the S. P. & S. bill of lading and placed on the defendant's train sheets. (Rec. 79.)

The work of operator Nash was connected with the movements of trains, at least one of which, on September 1, contained a shipment of shingles in N. W. car 21543, destined to Detroit, Michigan. (Rec. 63.) Similar interstate movement was shown as to the remaining causes of action.

United States mail was handled by defendant free of charge, although no record was kept of it. All mail destined for points on defendant's line was addressed to Kerry and there separated by the postmaster, placed in sacks, addressed to different camps along the defendant's line, and turned over to the defendant for delivery. (Rec. 58.)

ASSIGNMENTS OF ERROR.

It is not deemed necessary here to refer in detail to the several assignments of error. They all have reference to the one question involved, to wit, the interstate character of the defendant and its telegraph operator, which the trial court found against the Government.

QUESTIONS INVOLVED.

Is the character of a shipment to be determined by its ultimate destination when it starts on its journey, regardless of whether the same is moved on a through bill of lading or waybill or rebilled en route?

Was the defendant engaged in interstate commerce on the dates mentioned in the Government's complaint?

These questions have been decided favorably to the Government's contention by this court in the case of *Pacific Coast Ry. v. U. S.*, 173 Fed. 448. The facts in that case were substantially as follows: The Pacific Coast Railway was a narrow-gauge railroad situated wholly within the State of California and received freight from the Southern Pacific Company at San Luis Obispo which had been consigned from points in Eastern States and which had in some instances been billed from point of shipment to a station on the line of the plaintiff in error, and in other instances was billed to San Jose, a terminal point of the Southern Pacific Company. The road of plaintiff in error being narrow gauge, no cars of the Southern Pacific Company ever passed over its line, and all goods consigned to points on its line were unloaded at San Luis Obispo and there reloaded upon the cars of the plaintiff in error. In its opinion this court said:

The plaintiff in error argues that the decision of the court below rests upon the false premise that to render services to one who is engaged in interstate commerce is to engage in that commerce. But to our view, it rests upon a

broader basis than this. It rests upon the fact that the movement of the consigned goods to their ultimate destination from the point at which they were shipped in another State was in part conducted upon the road of the plaintiff in error, and that the interstate character of the shipment did not end until the transportation had reached its ultimate completion. The road of the plaintiff in error became a connecting carrier by virtue of the agreement between the consignor and the first carrier, whereby the latter undertook to deliver the goods at San Jose en route to their ultimate destination. Neither the fact that the consignor of goods originally consigned to San Jose directed the Southern Pacific Company prior to their arrival there to change the destination to a point on the road of the plaintiff in error, nor the fact that the road of the latter was so constructed as to make necessary the unloading and transfer of the goods to its cars, is sufficient to affect the interstate character of the transportation.

In the case of *Illinois Central Railroad Company v. Louisiana Railroad Commission*, 236 U. S. 157, the Supreme Court of the United States said, at page 163:

When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the

load reaches the point where the parties originally intended that the movement should finally end. And cases cited.

The Supreme Court of the United States, in a later case, reannounced the same principle, and which this court had theretofore announced in the Pacific Coast case, *supra*. The case referred to is that of *Western Oil Refining Company v. Lipscomb*, 244 U. S. 346, wherein the court said at page 349:

Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. And cases cited.

The undisputed facts in the instant case show that the defendant carrier was engaged in interstate commerce on the days in question, and that Operator Nash was so engaged. And this character of commerce is determined by the test prescribed by this court and the Supreme Court of the United States.

Without referring to the assignments of error in detail, it is manifestly evident that the trial court erred in not entering judgment for the Government;

in making findings to the effect that the carrier and the employee were not engaged in interstate commerce; and in refusing so to find, as requested by the Government.

It is, therefore, respectfully submitted that the judgment of the trial court should be reversed and the case remanded for a new trial.

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